Supreme Court, U.S.
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No.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ATLANTIC LLOYD'S INSURANCE COMPANY OF TEXAS, ATLANTIC MUTUAL INSURANCE COMPANY, CENTENNIAL INSURANCE COMPANY, H.R. MANAGEMENT COMPANY, HARRY W. REED, and GRAYSTAR MANAGEMENT,

*Petitioners,*

*v.*

THE ZURICH INSURANCE COMPANY and DIANNE THOMPSON,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Do federal courts have jurisdiction over independent actions seeking damages for fraud allegedly inducing a federal court's final judgment of dismissal and court-approved $10.3 million settlement, so that removal from state court is proper?

2. Does a court of appeals have jurisdiction to reverse an interlocutory district court decision denying remand, when it denies mandamus, no final judgment has been entered, and no interlocutory appeal has been certified?

## LIST OF PARTIES

The Petitioners in this Proceeding are Atlantic Lloyd's Insurance Company of Texas, Inc; Atlantic Mutual Insurance Company; Centennial Insurance Company; H. R. Management Company; Harry W. Reed; and Graystar Management.

The Respondents in this Proceeding are Zurich Insurance Company and Dianne Thompson.

## ALL PARTIES TO THE PROCEEDING IN THE DISTRICT COURT

David Prince appeared before the District Court as a third party defendant.

In addition to the Respondents here, the following parties appeared as Plaintiffs in the District Court but did not join in Respondents' Petition for Writ of Mandamus to the Fifth Circuit Court of Appeals: Sue Butler; Sheila Cauley; Brad Godwin; Gayle Godwin, individually and as personal representative of the Estate of Paul Godwin, Deceased; Stephen Grow; Delores Hardy; Marilyn Savage Martinez, as personal representative of the Estate of Helen Janice Savage, Deceased; Thomas J. May; Dean Pickrell, individually and as personal representative of the Estate of Daniel Pickrell, Deceased; Nicola Pickrell; Isaac Pineda; David Schnake; Ronald Scott; Alta Self, individually and as personal representative of the Estate of Clifton Self, Deceased; Willie L. Stafford; Mary Thomas; Melvin J. Thornton; and Ollie Mae Washington.

## RULE 29.6 LISTING

Atlantic Mutual Insurance Company, a Petitioner, is also the parent company of Petitioners Atlantic Lloyd's Insurance Company of Texas, Inc. and Centennial Insurance Co. No other Petitioner has a parent company or non-wholly owned subsidiary.

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Petitioners, Atlantic Lloyd's Insurance Company of Texas, Atlantic Mutual Insurance Company, Centennial Insurance Company, H. R. Management Company, Harry W. Reed, and Graystar Management (collectively "Defendants"),[1] respectfully pray that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on June 2, 1998.

## OPINIONS AND JUDGMENTS BELOW

The Opinion and Judgment of the three-judge panel of the United States Court of Appeals for the Fifth Circuit, entered June 2, 1998, is unreported but is reprinted in the Appendix to this Petition at Appendix A. The August 13, 1998 Order denying rehearing and rehearing *En Banc* is reprinted in the Appendix to this Petition at Appendix G.

The Order Denying Remand of the United States District Court for the Southern District of Texas, Houston Division, entered April 21, 1997, is reprinted in the Appendix to this Petition at Appendix B. The second Order Denying Remand of the District Court entered May 4, 1998 is reprinted in the Appendix to this Petition at Appendix D. The District Court Order of December 22, 1997 denying certification for interlocutory appeal is reprinted in the Appendix at Appendix E. Finally, the District Court Order remanding the case on September 29, 1998, after the Fifth Circuit's ruling, is reprinted in the Appendix at Appendix F.

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[1] Because of the numerous Petitioners-Defendants, Defendants will be used for ease of reference throughout this Petition.

## STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 2, 1998, reversing the Order Denying Remand of the United States District Court for the Southern District of Texas, Houston Division, entered April 21, 1997. A Suggestion for Rehearing and a Suggestion for Rehearing *En Banc* were both denied on August 13, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## STATUTES INVOLVED

This case involves the following provisions of the United States Code and the Federal Rules of Civil Procedure:

28 U.S.C. §1441(b):

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

Fed. R. Civ. P. 60(b):

> Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.
>
> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial

under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

28 U.S.C. § 1651(a):

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

## STATEMENT OF THE CASE

### A. Basis for Federal Jurisdiction in the Court of First Instance

Plaintiffs originally filed this action in state court in Harris County, Texas seeking damages for fraud allegedly perpetrated in the settlement of an earlier federal court suit. Because on its face Plaintiffs' suit is a collateral attack on the earlier federal court judgment of dismissal and that court's approval of the $10.3 million settlement, Defendants removed this suit to the United States District Court for the Southern District of Texas pursuant to 28 U.S.C. § 1441(b). Defendants alleged both federal question jurisdiction under Fed. R. Civ. P. 60(b) and diversity jurisdiction based on fraudulent joinder. The District Court agreed that Rule 60(b) confers federal removal jurisdiction when a federal judgment is collaterally attacked for fraud in state court and denied Plaintiffs' motion to remand. Although the Court of Appeals reversed in a *per curiam* opinion, it nonetheless recognized that the instant suit claims a "fraud was practiced upon the parties" in the settlement and dismissal of an earlier federal court suit.[2]

### B. The First Federal Suit

This controversy originated in 1988 as a damage suit that was removed to the United States District Court for the Southern District of Texas. Tenants and employees of the Fondren Green Apartments in Houston, Texas (the

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[2]The District Court ultimately ruled that no diversity jurisdiction exists and, therefore, after the Fifth Circuit's ruling, the case was remanded to state court on September 29, 1998. (App. F).

"Fondren Green Plaintiffs") sued the apartment management company, H.R. Management Company, and others for injuries allegedly caused when chlordane was allegedly sprayed inside their apartments. After several years of discovery, the federal action was settled and dismissed in 1993. Defendants paid a total of $10.3 million, which was allocated amongst the Fondren Green Plaintiffs, one of whom, along with Zurich Insurance Company ("Zurich"), is a Respondent here.[3]

In the settlement, the Fondren Green Plaintiffs unequivocally disclaimed reliance upon representations by the released parties: "I expressly warrant and represent . . . [that] no promise or representation of any kind has been made to me by the parties hereby released or by anyone acting for them . . . ." (App. K at 60a). The parties also submitted a Joint Motion to Approve Settlements and to Dismiss Plaintiffs' Claims Against H.R. Management Co. (App. I). In the motion, all parties, including the Fondren Green Plaintiffs, represented to the court that:

> Each plaintiff has received good and valuable consideration from H.R. Management Co. and its insurers in exchange for the agreements to settle and release all claims and causes of action against H.R. Management Co. with prejudice to plaintiffs to refile all or any part thereof.

(App. I at 51a). On March 19, 1993, Judge John D. Rainey entered an order approving the settlement and granting the Joint Motion to Dismiss. (App. J). In his order, Judge Rainey stated that "[t]he Court is of the

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[3] Only one Fondren Green Plaintiff and Zurich petitioned the Fifth Circuit for a writ of mandamus, although all Plaintiffs joined in the motion to remand.

opinion the Joint Motion is well taken and should be granted in its entirety." (App. J at 54a).

Judge Rainey also reviewed the terms of the settlement and release of all claims for one of the Plaintiffs, Helen Jan Savage, an incompetent adult, and found:

> [T]he legal representatives who have executed under oath the written Settlement and Release (the "Agreements") on behalf of Helen Jan Savage have authority to do so and that such Settlement and Release are to the benefit of and in the best interest of Helen Jan Savage.

(App. J at 55a). Thus, based on the representations made by the Fondren Green Plaintiffs and based on his independent review of the Settlement Agreements, Judge Rainey found the settlement fair, just, and in the Plaintiffs' best interest. (App. J). Accordingly, Judge Rainey ordered that:

> [A]ll claims and causes of action of each plaintiff named herein against H.R. Management Co. brought or which might have been brought herein are hereby in all things dismissed with prejudice to each plaintiff's right to refile all or any part thereof.

(App. J at 55a-56a).

### C. The Present Suit

Almost four years after dismissing their claims with prejudice, the Fondren Green Plaintiffs and Zurich (collectively "Plaintiffs") filed this suit in state court in Harris County, Texas, naming H.R. Management Co., an officer of the company, its insurers, and a purchaser of certain of its assets, as defendants.[4] (App. H). Plain-

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[4] Because of the numerous Plaintiffs in the District Court and because only two are Respondents here, for ease of reference, they will be referred to as "Plaintiffs" hereinafter.

tiffs allege that in the prior litigation, Defendants misrepresented the amount of insurance available and thereby induced Plaintiffs to settle for $15 million less than they otherwise would have settled. Plaintiffs do not claim that any liability policy was concealed from them; rather, in contravention of their attestations in the federal settlement that "no promise or representation of any kind has been made," Plaintiffs now claim that they relied on some oral representation that coverage under a $15 million policy had been denied. Recharacterizing their own lack of investigation or due diligence as Defendants' fraud, Plaintiffs now seek $15 million in damages, in addition to the $10.3 million already paid in settlement. Plaintiffs further seek punitive damages of not less than $55 million.

Because removal based on federal question jurisdiction under Fed. R. Civ. P. 60(b) is proper where a state court suit seeks to attack or undermine an order or settlement in a federal case, Defendants removed the case to federal court. In her Order Denying Remand, Judge Melinda Harmon agreed. (App. B). The District Court could not "discern any difference between a claim to set aside the *Thornton v. Fondren Green Apartments* judgment for fraud and a claim in tort for fraud arising out of the settlement approved by the [sic] Judge Rainey." (App. B at 7a-8a). Because a "party may not evade removal by artfully disguising the true purpose of its law suit in its complaint," (App. B at 7a), the District Court properly found this suit involves a "federal question of which federal district courts have original jurisdiction." (App. B at 7a).

Although Plaintiffs filed a Motion for Certification of Interlocutory Decision Pursuant to 28 U.S.C. § 1292 or,

Alternatively, Request for Entry of Final Judgment Pursuant to Rule 54(b), asking the court to certify the issue regarding jurisdiction, the District Court denied the motion (App. E). One former Fondren Green Plaintiff, Dianne Thompson, and Zurich thereafter filed a Petition for Writ of Mandamus with the United States Court of Appeals for the Fifth Circuit. In their petition, Ms. Thompson and Zurich asked the Fifth Circuit to issue a writ of mandamus directing the District Court to vacate her order denying remand and to enter an order remanding the case to state court.

The Fifth Circuit held the Petition for Mandamus in abeyance until the District Court considered this Court's intervening decision in *Rivet v. Regions Bank*, 118 S. Ct. 921 (1998). (App. C). After the District Court found *Rivet* inapplicable, a decision with which the Fifth Circuit agreed, the Fifth Circuit denied the Petition for Writ of Mandamus. (App. A). Despite denying the writ of mandamus, the Fifth Circuit nevertheless reversed and vacated the District Court's order denying remand and did so notwithstanding Judge Harmon's refusal to certify her ruling for interlocutory appeal before it and without having issued a writ of mandamus. (App. A).

In its *per curiam* decision, the Fifth Circuit recognized that the instant suit claims a "fraud was practiced upon the parties" in the earlier federal court suit. (App. A at 3a). Even so, the Fifth Circuit found the District Court did not have subject matter jurisdiction. *Id.* Rather—in plain contravention of the artful pleading doctrine—the Court relied solely on Plaintiffs' demand for relief and ruled that Plaintiffs' "suit is one for damages for fraud. It does not seek to reopen the dismissed case . . . ." *Id.* Based on this distinction without a difference, the

Fifth Circuit ruled no subject matter jurisdiction exists and, thus, effectively ignored the artfully disguised collateral attack on the federal court judgment of dismissal.[5]

## REASONS FOR GRANTING THE PETITION

### I.

### THE COURTS OF APPEALS ARE IN CONFLICT OVER WHETHER AND TO WHAT EXTENT FEDERAL COURTS HAVE JURISDICTION TO HEAR INDEPENDENT ACTIONS COLLATERALLY ATTACKING FINAL FEDERAL JUDGMENTS FOR FRAUD.

The courts of appeals have phrased the precise jurisdictional question presented here differently, but the principle involved is the same: Do federal courts have jurisdiction when a federal judgment is collaterally attacked? Because there is no clear answer to this question, federal courts have struggled over the issue of whether removal jurisdiction exists and have reached inconsistent results for different reasons. As discussed below, some have analyzed the question through the prism of Rule 60(b) while others have looked to the All Writs Act, 28 U.S.C. § 1651(a), and yet others have considered the question as one of ancillary jurisdiction. Whatever the legal basis or analytical approach, there is no cohesive federal jurisprudence on the jurisdictional limits and responsibilities of federal courts to hear independent actions attacking their final judgments. As a result, there is no clear guidance on whether state court actions collaterally attacking the validity of a federal

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[5]The Court also instructed the Judge to consider the issue of diversity jurisdiction, which she did. The District Court, finding no diversity jurisdiction, remanded the case to state court on September 29, 1998. (App. F).

judgment can be removed. This Court should issue a writ to settle this important question of federal jurisdiction.

Before the opinion in this case, it had long been the rule in the Fifth Circuit that state court suits purporting to seek additional damages for torts committed in the course of a federal court case could be removed to federal court because they are "within the purview of Fed. R R. Civ. P. 60(b)(3)." *Villarreal v. Brown Express, Inc.*, 529 F.2d 1219, 1221 (5th Cir. 1976). The court so ruled because these suits "can be viewed as an action which attacks the order of dismissal entered by the district court in the prior suit between these parties." *Id.* In *Villarreal*, the plaintiff settled a personal injury suit pending in federal court for more than $300,000, and one week later filed a state court suit for damages based on the same defendant's conversion of an important piece of evidence. According to the plaintiff, he settled his case for "substantially less" than he otherwise would have but for the converted evidence. *Id.* at 1220. Notwithstanding plaintiff's argument that his state court suit only sought damages for the conversion, the Fifth Circuit held the removal proper because a "party may not fraudulently evade removal by drafting a complaint so that the true purpose of the law suit is artfully disguised." *Id.* at 1221.

Almost twenty years later, the Fifth Circuit reaffirmed its commitment to the *Villarreal* principle. *Baccus v. Parrish*, 45 F.3d 958 (5th Cir. 1995). In *Baccus*, the Fifth Circuit stated that "[f]ederal jurisdiction is proper where a claim brought in state court seeks to attack or undermine an order of a federal district court." *Id.* at 960 (citing *Villarreal*); *accord Deauville Assocs. v. Lojoy Corp.*, 181 F.2d 5, 6 (5th Cir.), *cert. denied*, 340 U.S. 905

(1950). Because plaintiffs' claim in *Baccus* was a "collateral attack on the Lelsz settlement agreement," removal jurisdiction was proper. *Baccus,* 45 F.3d at 960.

In this case, Plaintiffs, as in *Villareal,* allege that the approved settlement and order of dismissal in the prior federal action were obtained by fraud. They specifically allege Defendants orally misrepresented the availability of coverage under a $15 million insurance policy. Despite Plaintiffs' disclaimer of any reliance on representations by Defendants in the Release, they now claim that but for the alleged fraud they would have settled for more, $15 million more. Because, however, Plaintiffs do not want to risk the $10.3 million they have already received, they artfully claim their suit is a state law claim for damages that does not attack the earlier federal settlement and dismissal.

The District Judge realized, however, there is no difference between seeking damages for fraud in the settlement and a claim to set aside the judgment itself for fraud. (App. B at 7a-8a). The District Court correctly ruled that this suit "is an examination of the [federal] judgment itself" and, therefore, invokes the "inherent power of the federal judicial branch." (App. B at 8a). To prevail in this case, Plaintiffs must establish that the $10.3 million received was not a fair settlement, in contradiction of Judge Rainey's approval of the settlement, and then, if the federal judgment is set aside, prove their damages from the alleged chlordane exposure. Irrespective of whether their suit is called a fraud claim for damages or an action to rescind the settlement and judgment for fraud, Plaintiffs seek additional damages for injury caused by the alleged chlordane exposure and seek to do indirectly what Fed. R. Civ. P. 60(b) or an independent action thereunder can accomplish directly. As such, their case belongs in federal court.

This decision holding otherwise disturbs previously settled Fifth Circuit law. More significantly, it opens the way for cleverly disguised collateral attacks on federal judgments without regard to federal principles of finality and supremacy.

The Ninth Circuit also followed the *Villarreal* principle to uphold removal jurisdiction. *Eyak Native Village v. Exxon Corp.*, 25 F.3d 773 (9th Cir.), *cert. denied*, 513 U.S. 943 (1994). *Eyak* arose out of the March 1989 Exxon Valdez oil spill. After Exxon settled both the state and federal governments' claims against it through an Agreement and Consent Decree, various environmental organizations thereafter pursued claims for natural resource damages. Exxon removed those cases to federal court as a collateral attack on a federal judgment because the settlement included "the public's" natural resources claims. The Ninth Circuit affirmed the district court's decision refusing remand because the "trust plaintiffs would have to be relieved of the consent decree in order to obtain damages beyond those awarded in the consent decree . . . ." *Id.* at 779.

The Second, Sixth, Seventh, and Eighth Circuits have upheld removal jurisdiction in limited instances based on the related policy behind the All Writs Act, 28 U.S.C. § 1651(a). Removal under the All Writs Act is "necessary to protect the integrity" of federal consent judgments from "potentially inconsistent state law claims." *Sable v. General Motors Corp.*, 90 F.3d 171, 175 (6th Cir. 1996). In *Sable*, plaintiff sought damages for failure to remove toxic chemicals, with the measure of damages being the cost of removal. The Plaintiff, however, did not seek removal of the chemicals themselves because to do so would have directly violated the federal consent decree already in place. *Id.* at 173. Because the relief

sought conflicted with the consent decree, the Sixth Circuit ruled the claim arose under federal law and the district court had jurisdiction under the All Writs Act. *Id.* at 174-75. The Second Circuit likewise permits removal under the All Writs Act in "exceptional cases" to protect federal consent decrees from inconsistent state orders, *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 864 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989), as do the Seventh and Eighth Circuits. *In re VMS Securities Litig.*, 103 F.3d 1317, 1324 (7th Cir. 1996); *NAACP v. Metropolitan Council*, 144 F.3d 1168, 1171 (8th Cir. 1998), *cert. denied*, ___ S. Ct. ___ , 1998 WL 348378, 67 USLW 3001 (Oct. 5, 1998).[6]

The Tenth Circuit, however, relied on its own earlier decision to reject the path chosen by the other circuits, finding that the All Writs Act "does not operate to confer jurisdiction." *Hillman v. Webley*, 115 F.3d 1461, 1469 (10th Cir. 1997) (quoting *Commercial Sec. Bank v. Walker Bank & Trust Co.*, 456 F.2d 1352, 1355 (10th Cir. 1972)). The Eleventh Circuit recently deferred consideration of the issue. *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1379 (11th Cir. 1998) ("We need not decide today whether the approach of the Second and

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[6]Cases permitting removal under the All Writs Act have generally relied on this Court's *dicta* in *United States v. New York Tel. Co.*, 434 U.S. 159, 173 (1977), that the All Writs Act authorizes courts "to issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained . . . ." The precise issue before the Court, however, was whether a federal court could properly order a telephone company to provide facilities and technical assistance to federal law enforcement officials based on the court's previous order authorizing "pen register" surveillance of telephone numbers dialed from a particular phone. Removal jurisdiction was not at issue.

Seventh Circuits . . . or that of the Tenth Circuit . . . is the correct one . . ."). In *Davis v. Glanton*, 107 F.3d 1044, 1047 n.4 (3d Cir.), *cert. denied*, 118 S. Ct. 159 (1997), the Third Circuit acknowledged in *dicta* that the All Writs Act could permit removal in exceptional circumstances but ruled that the case before it was not such a case.

More than one hundred years ago, this Court ruled that independent actions seeking to vacate a federal judgment for fraud indisputably fall within the rendering court's jurisdiction:

> Upon the question of jurisdiction there can be no doubt that the circuit court, as the court which made the Ketchum decree, and had jurisdiction of the Ketchum suit . . . has jurisdiction to entertain the present suit to set aside that decree [for fraud] . . . . On the question of jurisdiction the suit may be regarded as ancillary to the Ketchum suit, so that the relief asked may be granted by the court which made the decree in that suit, without regard to the citizenship of the present parties . . . .

*Pacific R.R. of Mo. v. Missouri Pac. Ry. Co.*, 111 U.S. 505, 521-22 (1884). The Second, Fifth, and Tenth Circuits have relied on that precedent to find that independent actions to set aside federal judgments for fraud remain within the rendering federal court's ancillary jurisdiction. *Weldon v. United States*, 70 F.3d 1, 4 (2d Cir. 1995); *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 70 (2d Cir. 1990); *Crosby v. Mills*, 413 F.2d 1273, 1275-76 (10th Cir. 1969); *Martina Theatre Corp. v. Schine Chain Theatres, Inc.*, 278 F.2d 798, 800 n.1 (2d Cir. 1960); *West Va. Oil & Gas Co. v. George E. Breece Lumber Co.*, 213 F.2d 702, 706 (5th Cir. 1954). The Fifth Circuit concluded that "a federal court, in an inde-

pendent action, has jurisdiction to modify a final judgment in a former proceeding on the ground of mistake as well as fraud . . . ." *West Va. Oil & Gas*, 213 F.2d at 706.

The Ninth Circuit, however, repudiated this approach based on this Court's decision of more recent vintage in *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994). *In re Hunter*, 66 F.3d 1002, 1005-06 (9th Cir. 1995) (federal jurisdiction is unavailable in suits seeking rescission of, and relief for, a fraudulently procured federal settlement and judgment of satisfaction). Thus, the Ninth Circuit implicitly ruled that *Kokkonen* supersedes *Pacific R.R.*, although it neither cited nor discussed the older case. Defendants submit that the Ninth Circuit misapplied *Kokkonen* because the plaintiff did not seek to enforce a settlement; he sought to set it aside for fraud.[7] This Court in *Kokkonen* emphasized that reopening or renewing a dismissed federal suit rests on entirely different jurisdictional footing than does enforcement of a settlement agreement reached in a federal suit. *Kokkonen*, 511 U.S. at 378. This Court, however, did not specify what that different jurisdictional footing is. It is this precise issue that Petitioners ask this Court to address.

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[7] For this reason, *Kokkonen* does not govern jurisdiction in this case because Plaintiffs neither seek enforcement of the settlement agreement nor damages for its breach. Rather, they seek damages in addition to those paid in settlement, thereby questioning the validity of the settlement and final judgment itself for fraud. Unlike *Kokkonen*, the earlier judgment of dismissal here is "flouted or imperiled" by this suit for fraud. *See Kokkonen*, 511 U.S. at 380. Nor is this case like *Rivet v. Regions Bank*, 118 S. Ct. 921 (1998), because the basis for removal is not the affirmative defense of res judicata or estoppel.

There should be no uncertainty regarding a federal court's jurisdiction over independent actions attacking federal judgments. Nevertheless, the decisions of the courts of appeals reflect uncertainty and inconsistency over whether federal jurisdiction extends to independent actions attacking their judgments. The Fifth Circuit's decision in this case likewise evidences a retreat from, or at least uncertainty regarding, the exercise of federal jurisdiction over independent actions attacking federal judgments. As a result, the question of a federal court's jurisdiction and the propriety of removal of independent actions initiated in state court will persist among the courts of appeals and district courts addressing removal unless this Court settles the fundamental issue. Simply put, whether federal jurisdiction exists in these cases deserves uniform treatment in the federal courts. Federal jurisdiction either exists such that removal is proper, or it does not.

## II.
## THE OPINION BELOW ADDRESSES AN IMPORTANT AND RECURRING QUESTION OF FEDERAL JURISDICTION THAT SHOULD BE SETTLED BY THIS COURT.

Resolution of the jurisdictional issue by ths Court—and a decision favoring the federal forum—is important to the integrity and functioning of the federal judiciary. Requiring that collateral attacks on federally approved settlements and orders of dismissal proceed in state court, as does the decision below, interferes with the proper functioning of the federal court system. Indeed, to deny federal courts the right to adjudicate what are properly federal court actions—either Rule 60(b) motions or independent actions thereunder—and the power to entertain suits attacking their own judgments threatens the

sanctity of federal judgments and is an affront to the federal judiciary itself.

Refusing federal jurisdiction in such suits undermines the finality of federal judgments by opening the door for a broad spectrum of collateral attacks in state court with no limit to the subsidiary and corollary litigation resourceful lawyers and litigants could file. For example, any time a federal litigant later suspects perjury occurred in a deposition, documents were wrongly withheld, or interrogatory responses were misleading, that litigant could then file a state court suit for fraud, the sole purpose of which is to seek damages arising from the conduct of federal litigation. The very purpose of Fed. R. Civ. P. 60(b)—whether relief is sought by motion or independent action —is to protect two, equally important interests: (1) the finality of federal court judgments, and (2) the rights of litigants who may have been victims of fraud, mistake, or excusable neglect. *See, e.g., Paddington Partners v. Bouchard,* 34 F.3d 1132, 1144 (2d Cir. 1992) (Rule 60 "preserves a balance between serving the ends of justice and ensuring that litigation reaches an end within a finite period of time"); *Bankers Mortg. Co. v. United States,* 423 F.2d 73, 77 (5th Cir.) (Rule 60(b) " must be carefully interpreted to preserve the delicate balance between the sanctity of final judgments . . . and the incessant command of the court's conscience that justice be done . . ."), *cert. denied,* 399 U.S. 927 (1970).

But if federal courts have no jurisdiction over these collateral attacks, federal litigation would never be "final" until a state court rules it was conducted fairly and without fraud. Prohibiting federal courts from hearing what are properly federal Rule 60(b) motions or independent actions thereunder subverts the federal principle of finality underlying Rule 60(b) in the first instance. As the First Circuit has properly ruled, "it is

inconceivable that the finality of otherwise valid federal judgments is dependent upon their validity under state law." *Geo. P. Reintjes Co. v. Riley Stoker Corp.*, 71 F.3d 44, 46 (1st Cir. 1995).

Federal courts should not be denied removal jurisdiction over state court suits collaterally attacking a federal judgment on the pretext they are independent state damage actions for fraud perpetrated in the federal case. The independent action contemplated by Rule 60(b) is an action to set aside a federal judgment, not an action to recover additional damages. Accordingly, the proper course is for the rendering federal court to exercise jurisdiction and vacate the judgment, assuming the requirements of a Rule 60(b) motion or independent action are satisfied, so that the parties may then be returned to their "pre-fraud" positions to conclude their earlier, federal litigation. "[T]he remedy for a serious procedural flaw is new, better, and fairer procedure, not a monetary award to the losing party." *Cool Light Co. v. GTE Corp.*, 24 F.3d 349, 353 (1st Cir.) (refusing a Rule 60(b)(6) motion to reinstate a jury verdict set aside by a district court alleged to be partial where an independent review of the evidence supported the district court's decision), *cert. denied*, 513 U.S. 994 (1994). *See also Robinson v. Volkswagenwerk AG*, 56 F.3d 1268, 1273 (10th Cir. 1995) (plaintiffs could not pursue damage claims for fraud perpetrated in securing an earlier federal court judgment "without first obtaining relief from the judgment" itself under Rule 60(b)), *cert. denied sub nom, Robinson v. Audi Aktiengesellschaft*, 516 U.S. 1045 (1996).

Although Plaintiffs here vigorously argue that they are not attempting to set aside the previous judgment—that is, they want to keep their $10.3 million settlement and

seek additional damages–regardless of how Plaintiffs denominate their claims, their suit is an independent action for relief contemplated by Rule 60(b).[8] As in *Robinson*, before seeking an additional monetary award, Plaintiffs here must first set aside the court approved settlement and federal judgment of dismissal.

Simply put, in the absence of a vacated judgment, state court suits that call into question the finality, validity, and fairness of federal court judgments tread where they should not. Just as principles of federalism and comity protect state courts from federal court interference, principles of supremacy and finality should likewise protect federal courts from state court interference. At a minimum, federal courts should not be denied jurisdiction over suits questioning the fairness and validity of their own judgments. As this Court stated in *Kokkonen*, federal jurisdiction is proper and necessary for a court "to manage its proceedings, vindicate its authority, and effectuate its decrees." 511 U.S. at 380.

Systemic reasons suggest that few, if any, similar cases will be properly postured to present themselves for this Court's review. District court decisions granting remand for lack of subject matter jurisdiction are barred from

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[8] District courts have misconstrued the import of Rule 60(b), denying removal of state law actions collaterally attacking federal judgments or settlements or erroneously suggesting that a litigant can simultaneously affirm a federal judgment and seek damages for fraud committed in procuring that judgment. *See Alfab, Inc. v. CNA Fin. Corp.*, 877 F.Supp. 1538, 1540 (M.D.Ala. 1995) (remanding on the ground that fraud perpetrated in federal court settlement can give rise to state damages action); *Cresswell v. Sullivan & Cromwell*, 668 F.Supp. 166, 168 (S.D.N.Y. 1987) (a party properly filed a second suit in federal court seeking damages for fraud perpetrated in a federal suit while affirming the judgment or settlement).

appellate review by 28 U.S.C. § 1447(d), and the standards for certification for interlocutory appeal under 28 U.S.C. § 1292(b) of decisions denying remand–as any other interlocutory decison–are exacting. For this reason, few cases on whether removal is proper under Rule 60(b) will ever be presented for appellate review.[9] As a result, there is little chance that a true conflict can develop among the circuits. Thus, this important federal issue may not ever qualify for this Court's review based on a well-developed conflict among the circuits, and its singular importance to the federal court system warrants that a writ issue here. Without a decision from this Court, cases may continue to be wrongly remanded to state court–with no possible appellate review–or cases may proceed to trial in federal courts in the absence of federal jurisdiction.

For this reason, the decision in *Alfab, Inc. v. CNA Fin. Corp.*, 877 F.Supp. 1538 (M.D. Ala. 1995), is noteworthy because it, like any remand order by a district court, could not be reviewed on appeal under §1447(d). In *Alfab*, plaintiffs sued in state court, alleging defendants "acted fraudulently in procuring the settlement reached in the previous [federal] action." *Id.* at 1540.

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[9] Indeed, this case typifies the difficulty in obtaining appellate review on the jurisdictional questions presented. District Judge Harmon refused to grant Plaintiffs' motion to certify her order denying remand for interlocutory appeal under §1292(b). Two Plaintiffs then sought and were denied a writ of mandamus from the Fifth Circuit. That would typically be the end of appellate review until after final judgment but for the procedural quirk here. Although the Fifth Circuit denied the writ of mandamus, it still reversed the District Court's remand decision. Defendants, of course, contend the Fifth Circuit did not have jurisdiction to do so, given its denial of the writ.

Defendants contended that the suit "necessarily questions the validity of the settlement agreement and since a federal judge signed the Settlement Stipulation," federal jurisdiction existed under Rule 60(b). *Id.* at 1540. The district court—misunderstanding the difference between suing to enforce a settlement and suing to set aside the settlement and order of dismissal for fraud—wrongly relied on this Court's decision in *Kokkonen* to remand the case.[10] District courts, such as in *Alfab*, are in critical need of this Court's guidance on the jurisdictional issue because an erroneous remand can never be corrected.[11]

## III.
## THE COURT OF APPEALS ACTED WITHOUT JURISDICTION.

After the District Court entered her Order Denying Remand, she refused Plaintiffs' motion to certify that decision for interlocutory appeal under 28 U.S.C. § 1292(b). As a result, two Plaintiffs then sought—*but were denied*—a writ of mandamus from the Fifth Circuit Court of Appeals seeking review of that remand decision. Nonetheless, the Fifth Circuit reversed and vacated the District Court order denying remand, despite having no jurisdiction to do so:

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[10] This is the same misreading of *Kokkonen* as the Ninth Circuit in *In re Hunter*, 66 F.3d at 1005-06.

[11] In an order just entered on November 2, 1998, the United States District Court for the Northern District of Texas remanded to state court a case by the same plaintiffs against different defendants based on the same claims at issue here. In the unpublished ruling, the District Court relied on the Fifth Circuit's unpublished opinion to find no federal jurisdiction. Like *Alfab*, this decision is not subject to review.

> We are asked to mandamus the district court and thereby require it to remand this case to the State court from which it was removed. We reverse the district court's decision and vacate her order denying remand; *deny mandamus* without prejudice to it being reurged, and remand this case to the district court to consider the issue of diversity jurisdiction.

(App. A at 1a). (emphasis added).

Appellate jurisdiction may only attach once a final judgment has been entered, 28 U.S.C. § 1291, or when interlocutory review is authorized by law. Here, although Plaintiffs sought certification for interlocutory appeal under 28 U.S.C. § 1292(b), the District Court denied their request. As a result, the only jurisdictional vehicle available to the Fifth Circuit to rule was the Petition for Writ of Mandamus. The Fifth Circuit, however, denied it. With no interlocutory appeal certified and having denied the Petition for Writ of Mandamus, the Fifth Circuit was without appellate jurisdiction to reverse and vacate the District Court's order.

## CONCLUSION

A decision by this Court whether a federal court properly has jurisdiction over independent actions attacking a federal judgment for fraud will resolve a number of important issues, including issues related to removal jurisdiction and the sanctity and finality of federal judgments. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 10, 1998

# APPENDIX A

[Filed JUN 2 1998]

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 98-20177

In Re: DIANNE THOMPSON;
ZURICH INSURANCE CO.

Petitioners.

Petition for Writ of Mandamus to
the United States District Court
for the Southern district of Texas
(H-96-CV-3762)

Before DUHE, DEMOSS and DENNIS, Circuit Judges.

PER CURIAM:[1]

We are asked to mandamus the district court and thereby require it to remand this case to the State court from which it was removed. We reverse the district court's decision and vacate her order denying remand; deny mandamus without prejudice to it being reurged; and remand this case to the district court to consider the issue of diversity jurisdiction.

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[1] Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit R. 47.5.4.

## BACKGROUND

In a damage suit in federal court in Texas, tenants of Fondren Green Apartments sued the apartment management company, various insurance companies, and other defendants for injuries allegedly caused when chlordane was sprayed inside their apartments. A settlement was reached and the presiding district judge entered an order which determined that a minor and an incompetent, who were among the plaintiffs, were properly before the court; he then granted the joint motion to dismiss the case with prejudice because it had been settled. His order did not adopt nor approve the terms of the settlement.

The present suit, originally brought in state court, arises from the settlement and is brought on behalf of the same plaintiffs who now claim that they were induced to settle for less than the true value of their claim because of fraud practiced on them by the present defendants. Plaintiffs allege that the management company disclosed in the first suit that there were potentially three insurance policies applicable to the claimed losses with limits of $300,000, $10,000,000 and $15,000,000 respectively. Attorneys for the management company and the insurers allegedly indicated to plaintiffs' counsel that coverage under the $15,000,000 policy had been denied and that the $300,000 policy had been exhausted by earlier settlements. The only remaining policy, they represented, had less than $10,000,000 in remaining benefits available. The case settled for $10,000,000.

Later, it is presently alleged, plaintiffs learned that the information concerning the availability of insurance benefits was not accurate, and that coverage under the $15,000,000 policy had not been denied and was available. Plaintiffs then brought the present suit in state court

seeking damages for fraudulent inducement in making the settlement.

Defendants removed the present suit to the southern district of Texas, and plaintiffs moved to remand. The district court determined that the present action was simply an artfully pled attempt to attack the prior federal judgment of dismissal and thus gave rise to federal question jurisdiction. She therefore denied remand. Plaintiffs then sought mandamus. We retained jurisdiction and remanded to the district court to consider the effect, if any, of the intervening opinion of the Supreme Court in *Rivet v. Regions Bank*, ___ U.S. ___, 118 S.Ct. 921 (Feb. 24, 1998). She did so, correctly concluding that *Regions* was not dispositive of this case. The matter is now before us again.

## DISCUSSION

We hold that the district court erred in holding that the present fraud suit is an attack upon the initial federal judgment dismissing the original tort case. Therefore, we hold that the district court does not have subject matter jurisdiction.

The present suit is one for damages for fraud. It does not seek to reopen the dismissed case nor does it question the validity of the judgment dismissing that case. It claims that the fraud was practiced upon the parties, not upon the court. Thus, our decision in *Villarreal v. Brown Express, Inc.*, 529 F.2d 1219 (5th Cir. 1976) is not applicable. There we upheld removal because plaintiff was using the second state court suit to increase his personal injury recovery and to circumvent two orders of the federal court. Here plaintiffs are not trying to circumvent the order of dismissal. Rather, they allege a separate state law cause of action for which they seek damages. The

issue of the first suit (whether spraying the chemical caused injury) is not at issue in the present suit for fraud. For these reasons we reverse and vacate the district court's judgment denying the motion to remand. We deny mandamus, however, because the issue of diversity jurisdiction raised by the parties has not been dealt with by the district court. She had no need to consider it once she disposed of the remand issue on the ground of federal question jurisdiction. We express no opinion as to the allegations of fraudulent joinder of parties, nor as to the presence or absence of diversity jurisdiction, but remand to the district court to consider those issues. We do not retain jurisdiction of the matter pending her decision.

REVERSED AND REMANDED; MANDAMUS DENIED.

## APPENDIX B

[Filed APR 21 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-96-3762

SUE BUTLER, et al.

Plaintiffs,

vs.

H.R. MANAGEMENT CO., et al.,

Defendants.

### ORDER DENYING MOTION TO REMAND

Pending before the Court is Plaintiffs' Motion to Remand (Instrument No. 16). After considering the motion, the responses, and the applicable law, the Court finds that the motion should be denied.

This action was originally filed in the 269th Judicial District Court of Harris County, Texas on October 4, 1996. It was removed to this Court on November 1, 1996. The Defendants claim in their removal action that this Court has jurisdiction because of the diversity of the parties despite fraudulent joinder and because the Plaintiffs seek to set aside a judgment of this United States District Court. This order shall address only the Defen-

dants' claim that the Plaintiffs seek to set aside a federal judgment.

This case arises out of two other federal actions, *Thornton v. Fondren Green Apartments*, Civil Action No. H-91-1673 (S.D. Tex. Mar. 23, 1993) (order granting Joint Motion to Approve Settlements and to Dismiss Plaintiffs' Claims Against H.R. Management Co.) (Rainey, J.) and *H.R. Management Co. v. Zurich Ins. Co.*, No. 3-93-CV-2059-T (N.D. Tex. Feb. 29, 1996) (order granting Agreed Motion to Disqualify).

The Plaintiffs in count one of their original petition filed in state court claim that "Defendants, acting alone and in complicity with others, falsely misrepresented material facts to the Fondren plaintiffs with the intent to induce them to settle their claims for at least $15,000,000 less than settlement value. The Fondren plaintiffs entered into a settlement agreement with Defendants after relying upon Defendants' fraudulent misrepresentations." (Pls.' Pet. at 9). The Plaintiffs seek monetary relief for these damages. *Id.* at 14.

The settlement agreement that is the subject of this claim of fraud and conspiracy to defraud was considered by Judge Rainey in the parties' Joint Motion to Approve Settlements and to dismiss Plaintiffs' Claims Against H.R. Management Co. in *Thornton v. Fondren Green Apartments*, Civil Action No. H-91-1673 (S.D. Tex. case filed June 17, 1991). In his order granting the motion, Judge Rainey stated that "[t]he Court is of the opinion the Joint Motion is well taken and should be granted in its entirety." *Thornton v. Fondren Green Apartments*, Civil Action No. H-91-1673, slip op. at 1 (S.D. Tex. Mar. 23, 1993) (order granting Joint Motion to Approve Settlements and to Dismiss Plaintiffs' Claims Against H.R. Management Co.). Judge Rainey also reviewed the terms of

the settlement and release of all claims for one of the plaintiffs, Helen Jan Savage, an incompetent adult, and found that they were to her benefit and best interest. *Id.* at 2. He ordered that "upon the payment of Plaintiff's [sic] court costs all claims and causes of action of each Plaintiff named herein against H.R. Management Co. brought or which might have been brought herein are hereby in all things dismissed with prejudice to each Plaintiff's right to refile all or any part thereof." *Id.*

A party may not evade removal by artfully disguising the true purpose of its law suit in its complaint. *Villarreal v. Brown Express, Inc.*, 529 F.2d 1219, 1221 (5th Cir. 1976). While purporting to seek damages for fraud in a settlement agreement, this action is essentially an attack on the judgment in *Thornton v. Fondren Green Apartments.* The proper method for a party seeking relief from a federal judgment on the grounds of fraud is under Federal Rule of Civil Procedure 60(b). Such an action brought in state court is removable to this Court because it involves a federal question of which federal district courts have original jurisdiction. 28 U.S.C. § 1441(a); *Villarreal*, 529 F.2d at 1221. The Court finds that this action was properly removed.

The Plaintiffs argue that this law suit is not a collateral attack on a fderal judgment, but a claim in tort for fraud. Citing to *Kokkonen v. Guardian Life Ins. Co. of America*, 114 S.Ct. 1673, 1677 (1994), they point out that a federal court does not have jurisdiction to enforce federal court settlements, absent an agreement of the parties. Similarly, they believe that federal courts do not have jurisdiction over a claim in tort for fraud arising out of a federal settlement.

The Court is unable to discern any difference between a claim to set aside the *Thornton v. Fondren Green*

*Apartments* judgment for fraud and a claim in tort for fraud arising out of the settlement approved by the Judge Rainey. Both involve the same inquiry on the same facts and seek essentially the same damages.

*Kokkonen* does not address whether a federal court has jurisdiction where a party seeks to reopen a dismissed suit by reason of breach of the agreement that was the basis for the dismissal. The Supreme Court specifically distinguished that case from the one which was before it, the enforcement of a settlement agreement or the claim for breach of contract. Id. at 1675-76. Federal jurisdiction is even more essential in the case here where the Plaintiffs seek to set aside the *Thornton* judgment based upon fraud. A suit in state court involving a claim for breach of contract, part of the consideration of which was dismissal of an earlier federal lawsuit, does not invoke the inherent power of the federal judicial branch. *Id.* at 1677. Reopening a federal judgment in a state court case on the basis of fraud, however, does. The former is ancillary and remote from the federal court's judgment, while the latter is an examination of the judgment itself.

Accordingly, the Court

ORDERS that Plaintiffs' Motion to Remand (Instrument No. 16) is DENIED;

and further ORDERS Plaintiffs Sue Butler, Sheila Cauley, Brad Godwin, Gayle Godwin, individually and as personal representative of the estate of Paul Godwin, deceased, Stephen Grow, Delores Hardy, Marilyn Savage Martinez, as personal representative of the estate of Helen Janice Savage, deceased, Thomas J. May, Dean Pickrell, individually and as next friend of Daniel Pickrell, Nicola Pickrell, Isaac Pineda, David Schnake, Ronald Scott, Alta Self, Clifton Self, Willie L. Stafford, Mary Thomas, Dianne

Thompson, Melvin J. Thornton, and Ollie Mae Washington, within fifteen (15) days of the date of the filing of this order, to amend the fraud claim that is based on Judge Rainey's Order in *Thornton v. Fondren Green Apartments*, Civil Action No. H-91-1673 (S.D. Tex. Mar. 23, 1993) (order granting Joint Motion to Approve Settlements and to Dismiss Plaintiffs' Claims Against H. R. Management Co.) to conform to the requirements of Federal Rule of Civil Procedure 60(b). Failure to comply with this order will result in the dismissal of this claim.

SIGNED at Houston, Texas, this 18th day of April 1997.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

## APPENDIX C

[Filed APR 3 1998]

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 98-20177

In Re: DIANNE THOMPSON;
ZURICH INSURANCE COMPANY,

Petitioners,

Petition for Writ of Mandamus
to the United States District Court
for the Southern District of Texas

Before DUHE, DeMOSS and DENNIS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is held in abeyance pending a decision by the district court on the motion to reconsider its remand order pending before it. Since that motion is based on Supreme Court authority decided after the district court first acted on the remand issue, the district court should have the first opportunity to consider it.

## APPENDIX D

[Filed MAY 4 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-96-3762

SUE BUTLER, et al.,

Plaintiffs,

vs.

H.R. MANAGEMENT CO., et al.,

Defendants.

### ORDER

Pending before the Court is Plaintiffs' Motion for Reconsideration of Order Refusing to Remand (Instrument No. 398). The Plaintiffs argue in their motion that the United States Supreme Court's recent decision in *Rivet v. Regions Bank of La.*, No. 96-1971, 1998 WL 71832 (Feb. 24, 1998) demonstrates conclusively that the case was improperly removed by the Defendants. After examining the motion, response, and accompanying case law, the Court finds that the motion must be denied.

In this case, as is more fully set out in the Court's Order Denying Motion to Remand (Instrument No. 127), the Plaintiffs seek to set aside a federal judgment based on fraud. In *Rivet*, the Supreme Court held that

"claim preclusion by reason of a prior federal judgment is a defensive plea that provides no basis for removal . . . . Such a defense is properly made in the state proceedings, and the state courts' disposition of it is subject to this Court's ultimate review." *Rivet*, 1998 WL 71832, at *6.

When a defendant removes a state court case on the basis of a defense of claim preclusion because of a prior federal court judgment, the judgment itself remains unaffected. The state court merely examines and applies the judgment in determining whether the plaintiff's claim is barred by res judicata. A plaintiff's claim of relief from a federal judgment because the judgment was obtained by fraud is an attack on the federal judgment itself. Such an attack is a federal question because it seeks to set aside a federal court's judgment and it involves the inherent power of the federal judiciary.

Accordingly, the Court

ORDERS that Plaintiffs' Motion for Reconsideration of Order Refusing to Remand (Instrument No. 398) is DENIED.

SIGNED at Houston, Texas, this 4th day of May 1998.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

## APPENDIX E

[Filed DEC 22 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H 96-3762

SUE BUTLER, et al.,

Plaintiffs,

vs.

H.R. MANAGEMENT CO., et al.,

Defendants.

### ORDER

Pending before the Court is Plaintiffs' Motion for Certification of Interlocutory Decision Pursuant to 28 U.S.C. § 292 or, Alternatively, Request for Entry of Final Judgment Pursuant to Rule 54(b) (Instrument No. 142). After reviewing its order of April 21, 1997, the Court finds that based on the strength of the authority it has relied upon in reaching its decision there does not exist such a decree of uncertainty in the law that the consideration of judicial economy and fairness would demand an interlocutory review of this order. Similarly, the Court finds it would be unwise to direct the entry of a final judgment under Federal Rules of Civil Procedure 54(b) proposed by the Plaintiffs ~~be~~cause the inconvenience and costs associated with the piecemeal

review of this very complex case far outweigh the danger to the Plaintiffs that justice will be denied by delay.

Accordingly, the Court

ORDERS that Plaintiffs' Motion for Certification of Interlocutory Decision Pursuant to 28 U.S.C. §1292 or, Alternatively, Request for Entry of Final Judgment Pursuant to Rule 54(b) (Instrument No. 142) is DENIED.

SIGNED at Houston, Texas, this 19th day of December 1997.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

## APPENDIX F

[Filed SEP 29 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-96-3762

SUE BUTLER, *et al.*,

Plaintiffs,

vs.

H.R. MANAGEMENT COMPANY, *et al.*,

Defendants.

REMAND ORDER

In accordance with the Memorandum Opinion and Order issued this day, it is hereby

ORDERED that this case is REMANDED to the 269th Judicial District Court of Harris County, Texas, for lack of subject matter jurisdiction.

SIGNED at Houston, Texas, this 29th day of September, 1998.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

[Filed SEP 29 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-96-3762

SUE BUTLER, *et al.*,

Plaintiffs,

vs.

H.R. MANAGEMENT COMPANY, *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER

This case is before the Court for a decision regarding whether there is subject matter jurisdiction. The United States Court of Appeals for the Fifth Circuit has held that there is no federal question jurisdiction, and has remanded for this Court to determine whether there is diversity jurisdiction. It is undisputed that Plaintiffs' complaint contains non-diverse parties. Defendants argue that H.R. Management Company ("HRM"), Harry W. Reed, Graystar Management, and Atlantic Lloyd's Insurance Company of Texas, four of the six Defendants in this case, were fraudulently joined.

The Court has carefully reviewed the pleadings and the briefing filed by the parties. Based on this review and the application of governing legal authorities, the case is

REMANDED to the 269th Judicial District Court of Harris County, Texas.

## I. LEGAL AND PROCEDURAL BACKGROUND

This fraud case arises out of an underlying lawsuit filed by residents of Fondren Green Apartments (the "Fondren Green Plaintiffs") against a number of defendants including HRM, the apartment manager. The Fondren Green Plaintiffs alleged damages resulting from exposure to Chlordane used to spray the apartments for flea infestation. The suit was settled, and each of the Fondren Green Plaintiffs signed a settlement and release agreement. In accordance with the settlement, the presiding judge dismissed the Fondren Green Plaintiffs' complaint against HRM.

The Fondren Green Plaintiffs, together with Zurich Insurance Company, filed this lawsuit in state court in October 1996, alleging that the settlement of the underlying Chlordane litigation had been fraudulently induced by HRM and the other defendants. Defendants removed the case to this court on the basis of both federal question and diversity jurisdiction, and Plaintiffs moved to remand. The sole issue currently before the Court is whether the non-diverse defendants were fraudulently joined. If not, complete diversity does not exist and the case must be remanded for lack of subject matter jurisdiction.

## II. THE FRAUDULENT JOINDER STANDARD

The Fifth Circuit has recently, and emphatically, stressed that a removing party asserting fraudulent joinder bears a "heavy burden." *Rodriguez v. Sabatino*, 120 F.3d 589, 591 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1511 (1998), *quoting Cavallini v. State Farm Mutual Auto Insurance Co.*, 44 F.3d 256, 259 (5th Cir. 1995).

To prove that a nondiverse defendant has been fraudulently joined for the purpose of defeating diversity jurisdiction, the removing party must demonstrate either a fraudulent recitation of jurisdictional facts or that "there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendants in state court." *Id.* Defendants do not allege fraud in the recitation of the jurisdictional facts. The issue is whether Defendants have shown that there is no possibility that Plaintiffs can establish any of the causes of action asserted against the non-diverse Defendants in state court. To determine this issue, the Court must "evaluate all of the factual allegations in the plaintiff's state court pleadings in the light most favorable to the plaintiff, resolving all contested issues of substantive fact in favor of the plaintiff" and must "examine relevant state law and resolve all uncertainties in favor of the nonremoving party." *Rodriguez*, 120 F.3d at 591, *quoting Green v. Amerada Hess Corp.*, 707 F.2d 201, 205-06 (5th Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984). Fraudulent joinder has been proven only if, "after resolving all disputed questions of fact and all ambiguities in the controlling state law in favor of the non-removing party . . ., there is no possibility that the state court would recognize a valid cause of action against the non-diverse defendant[] . . ." *Burden v. General Dynamics Corp.*, 60 F.3d 213, 217 (5th Cir. 1995).

The fraudulent joinder determination is to be made under a "summary judgment-like procedure," under which a court may consider matters outside the pleadings if made part of the record. *LeJeune v. Shell Oil Co.*, 950 F.2d 267, 271 (5th Cir. 1992), *citing Carriere v. Sears, Roebuck and Co.*, 893 F.2d 98, 100 (5th Cir.), *cert.*

*denied*, 498 U.S. 817 (1990).[1] However, the cases make it clear that a district court may not "pretry" cases; the fraudulent joinder issue is to be resolved by "summary determination." *Sid Richardson Carbon & Gasoline Co. v. Interenergy Resources, Ltd.*, 99 F.3d 746, 751 (5th Cir. 1996).

The question is not whether Plaintiffs will probably prevail in state court, but only whether there is a possibility that they may prevail on any of the causes of action asserted against the in-state Defendants. *Rodriguez*, 120 F.3d at 591. If the Court concludes that there is no possibility that Plaintiffs could assert a valid cause of action against the subject Defendants, the Court may find that they have been fraudulently joined and disregard their citizenship in determining whether complete diversity exists. If, however, there is any possibility that a state court would find a cause of action against the in-state Defendants on the facts Plaintiffs allege, the Court must conclude that there is no fraudulent joinder and no federal jurisdiction for lack of complete diversity. Whether Plaintiffs are likely to succeed on the merits of their causes of action is simply not relevant. *Burden v. General Dynamics, Inc.*, 60 F.3d 213 (5th Cir. 1995).

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[1]The Fifth Circuit has clarified that while the fraudulent joinder analysis is similar to summary judgment analysis, it is modified; the inquiry is limited to whether the plaintiff can establish a cause of action under state law against the nondiverse defendant. *Sid Richardson Carbon & Gasoline Co. v. Interenergy Resources, Ltd.*, 99 F.3d 746, 751 (5th Cir. 1996); *Rodriguez*, 120 F.3d at 591.

## III. LEGAL ANALYSIS

Plaintiffs allege that Defendants, including the four non-diverse Defendants, fraudulently induced the settlement of the underlying litigation by intentionally misrepresenting the amount of insurance coverage available for payment of Plaintiffs' claims. In order to establish a cause of action for fraudulent inducement under Texas law, Plaintiffs must establish that (1) a material representation was made; (2) the representation was false; (3) the person making the representation knew at the time it was made that it was false or it was made recklessly, without any knowledge of its truth and as a positive assertion; (4) the individual making the representation made it with the intention that it should be acted upon by the party claiming fraud; (5) the individual claiming fraud acted in reliance on the representation; and (6) the individual, in so acting, suffered an injury. *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983); *Circuit City Stores, Inc. v. Curry*, 946 S.W.2d 486, 4 489 (Tex. App.—Fort Worth 1997, no writ).

Plaintiffs allege each of these elements against Defendants. Plaintiffs allege that Defendants knowingly misrepresented material facts regarding the amount of insurance coverage available for payment of the claims. Plaintiffs allege that Defendants made this misrepresentation intending that Plaintiffs would rely upon the misrepresentation, that Plaintiffs entered into the settlement agreement in reliance upon Defendants' representation, and that Plaintiffs were injured because they settled their claims for significantly less than the true settlement value. Based on these allegations, the Court cannot conclude that Plaintiffs could not possibly assert a valid cause of action for fraudulent inducement under Texas law.

Defendants argue that the releases executed in connection with the settlement agreement bar, as a matter of law, Plaintiffs' fraudulent inducement claim because the releases state that Plaintiffs "have relied solely and completely on [their] own judgment, and the advice of [their] counsel" in deciding to settle the Chlordane litigation. In support of their argument, Defendants cite *Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997).

In *Schlumberger*, the parties were engaged in a joint venture to mine diamonds from the ocean floor. Swanson became concerned because Schlumberger was allegedly not providing information on the project's progress. For a period of approximately thirteen months, Schlumberger negotiated its withdrawal from the joint venture. Swanson alleged that "Schlumberger represented to them that the sea-diamond project was neither technologically feasible nor commercially viable, but refused to given them joint venture progress reports and other information and data supporting Schlumberger's views." *Id.* at 174. Swanson ultimately agreed to sell its interest in the joint venture to Schlumberger for approximately $814,000. In exchange, Swanson signed a release which stated that the Swansons "were not relying on any statement or representation of Schlumberger, . . . that they were relying on their own judgment, and that they had been represented by counsel who had explained the entire contents and legal consequences of the release." *Id.*

Swanson later sued Schlumberger, alleging that Schlumberger had fraudulently induced the sale of Swanson's interest in the joint venture by misrepresenting the sea-diamond project's viability and value. Following trial, the jury found for Swanson. The trial court entered a judgment in favor of Schlumberger notwithstanding the

jury's verdict, the Texas court of appeals reversed and entered judgment in accordance with the jury's findings, and the Texas Supreme Court reversed the court of appeals and entered judgment for Schlumberger. On the release issue, the Texas Supreme Court specifically held "that a release that clearly expresses the parties' intent to waive fraudulent inducement claims, or one that disclaims reliance on representations about specific matters in dispute, can preclude a claim of fraudulent inducement. *We emphasize that a disclaimer of reliance or merger clause will not always bar a fraudulent inducement claim.* We conclude only that *on this record,* the disclaimer of reliance conclusively negates as a matter of law the element of reliance on representations about the feasibility and value of the sea-diamond mining project . . ." *Id.* at 181 (emphasis added and citations omitted).

Plaintiffs contest Defendants' position that the amount of available insurance coverage was a "specific matter is dispute" during settlement negotiations. The Court in deciding a fraudulent joinder question is required to construe all such contested issues of fact in favor of Plaintiffs. The *Schlumberger* case, limiting itself to the specific record of that case and emphasizing that disclaimers of reliance will not always bar fraudulent inducement claims, does not support Defendants' argument that Plaintiffs in this case have no possibility of prevailing on their fraudulent inducement claim against the non-diverse Defendants.

Defendants also argue that the Fondren Green Plaintiffs cannot provide evidence of the alleged misrepresentations, that the alleged representations regarding insurance coverage are not material, and that Plaintiffs should be bound by the knowledge which a proper investigation would have revealed. These argument, however, are not relevant to the fraudulent joinder issue which focuses

exclusively on whether Plaintiffs' allegations, with all factual contentions resolved in Plaintiffs' favor, can possibly support a cause of action against the non-diverse Defendants under Texas law.

Plaintiffs have properly alleged a viable fraudulent inducement cause of action against the non-diverse Defendants. Whether Plaintiffs can produce evidence to support their allegations or can survive any subsequently-filed motion for summary judgment raising *Schlumberger* is not a matter before this Court. Defendants have merely failed to satisfy their very heavy burden of showing that there is no possibility that Plaintiffs can prevail on their fraudulent inducement claim against the non-diverse Defendants.[2] As a result, this Court cannot conclude that the non-diverse Defendants were fraudulently joined.

## IV. CONCLUSION AND ORDER

The Fifth Circuit places a very heavy burden on a party arguing fraudulent joinder. The Court concludes that Defendants in this case have failed to satisfy that burden. Accordingly, it is hereby

ORDERED that this case will be remanded by separate order for lack of subject matter jurisdiction (Instrument No. 494 and No. 522). Any pending motions are DENIED WITHOUT PREJUDICE to their being reurged, if appropriate, in state court following remand.

SIGNED at Houston, Texas, this 29th day of September, 1998.

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[2] Because the Court has determined that there is no fraudulent joinder as to the fraudulent inducement claim, the Court need not address whether there is fraudulent joinder as to the alleged insurance code violations.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

## APPENDIX G

[Filed AUG 13 1998]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-20177

In Re: DIANNE THOMPSON;
ZURICH INSURANCE COMPANY

Petitioners

Appeal from the United States District Court
for the Southern District of Texas, Houston

*ON PETITION FOR REHEARING*
*AND SUGGESTION FOR REHEARING EN BANC*

(Opinion 06/02/98, 5 Cir., ___ , ___ F.3d ___ )

Before DUHÉ, DeMOSS, and Dennis, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R.

APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ John M. Duhe, Jr.
United States Circuit Judge

## APPENDIX H

[Filed OCT 30 1996]

NO. 96-50493

IN THE DISTRICT COURT
296th JUDICIAL DISTRICT
HARRIS COUNTY, TEXAS

SUE BUTLER, SHEILA CAULEY, BRAD GODWIN, GAYLE GODWIN, individually and as personal representative of the ESTATE OF PAUL GODWIN, deceased, STEPHEN GROW, DELORES HARDY, MARILYN SAVAGE MARTINEZ, as personal representative of the ESTATE of HELEN JANICE SAVAGE, deceased, THOMAS J. MAY, DEAN PICKRELL, individually and as next friend of DANIEL PICKRELL, NICOLA PICKRELL, ISAAC PINEDA, DAVID SCHNAKE, RONALD SCOTT, ALTA SELF, CLIFTON SELF, WILLIE L. STAFFORD, MARY THOMAS, DIANNE THOMPSON, MELVIN J. THORNTON, OLLIE MAE WASHINGTON and ZURICH INSURANCE COMPANY,

Plaintiffs,

vs.

H.R. MANAGEMENT COMPANY, HARRY W. REED, GRAYSTAR MANAGEMENT, ATLANTIC MUTUAL INSURANCE COMPANY, ATLANTIC LLOYD'S INSURANCE COMPANY OF TEXAS, and CENTENNIAL INSURANCE COMPANY,

Defendants.

## PLAINTIFFS' FIRST AMENDED ORIGINAL PETITION

Plaintiffs file their First Amended Original Petition and would respectfully show the Court as follows:

### I.

### NATURE OF THE CASE

1. This is a fraud lawsuit against a group of insurance companies known as the Atlantic Insurance Companies and their insureds. The fraud concerns the defense and settlement of the Fondren Green litigation filed in Houston, Texas in 1988. The Atlantic Insurance Companies, in order to protect over $25,000,000 in insurance coverage, are alleged to have committed numerous, serious acts of deceit in defense of litigation brought against their insureds, H.R. Management Company and Harry W. Reed. These acts of fraud included the following:

a. Lying to survivors of chlordane exposure concerning the availability of insurance in order to extract an unfair settlement;

b. Concealing from other insurance companies the criminal conduct of those insured by the Atlantic Insurance Companies in order to induce benefits to which neither the Atlantic Insurance Companies nor their insureds were entitled;

c. Obstructing through lies and deceit the efforts of other, responsible and honest insurance companies to reach fair settlements with victims of the chlordane spraying in a prompt and humane manner; and

d. Suborning perjury in a later filed federal court proceeding in Dallas, Texas in order to cover-up the fraud committed against the chlordane victims.

II.

PARTIES

2. Plaintiffs Sue Butler, Sheila Cauley, Brad Godwin, Gayle Godwin, individually and as personal representative of the Estate of Paul Godwin, deceased, Stephen Grow, Delores Hardy, Marilyn Savage Martinez, as personal representative of the Estate of Helen Janice Savage, deceased, Thomas J. May, Dean Pickrell, individually and as next friend of Daniel Pickrell, Nicola Pickrell, Isaac Pineda, David Schnake, Ronald Scott, Alta Self, Clifton Self, Willie L. Stafford, Mary Thomas, Dianne Thompson, Melvin J. Thornton, and Ollie Mae Washington are individuals residing in Texas (collectively, the "Fondren plaintiffs").

3. Plaintiff Zurich Insurance Company ("Zurich") is a foreign insurance company that does business in the State of Texas.

4. Defendant H.R. Management Company ("H.R. Management") is a Texas corporation doing business in Texas. Its principal place of business is in Harris County, Texas. H.R. Management may be served with service of process by serving its President, Harry W. Reed, at Two Riverway, Suite 850, Houston, Texas 77056.

5. Defendant Harry W. Reed ("Reed") is an individual doing business in Texas and the alter ego of H.R. Management. His residence is in Harris County, Texas. Reed may be served with process at Two Riverway, Suite 850, Houston, Texas 77056.

6. Defendant Graystar Management ("Graystar") is a company doing business in Texas and the successor to H.R. Management. Its principal place of business is in Harris County, Texas. Graystar may be served with process by serving David Hargrove, at Two Riverway, Suite 850, Houston, Texas 77056.

7. Defendant Atlantic Mutual Insurance Company ("Atlantic Mutual") is a New York insurance company doing business in Texas. Its principal office in Texas is in Dallas County, Texas. Atlantic Mutual may be served with service of process by serving its registered agent for service of process, Nicholas Peters, at 7557 Rambler, Suite 1000, Dallas, Texas 75231.

8. Defendant Atlantic Lloyd's Insurance Company of Texas ("Atlantic Lloyd's") is a Texas insurance company doing business in Texas. Its principal office in Texas is in Dallas County, Texas. Atlantic Lloyd's may be served with service of process by serving its registered agent for service of process, G. Steven Collier, at 7557 Rambler, Suite 1000, Dallas, Texas 75231.

9. Defendant Centennial Insurance Company ("Centennial") is a New York insurance company doing business in Texas. Its principal office in Texas is in Dallas County, Texas. Centennial may be served with service of process by serving its registered agent for service of process, Nicholas Peters, at 7557 Rambler, Suite 1000, Dallas, Texas 75231.

## III.

## JURISDICTION AND VENUE

10. The amount in controversy, exclusive of interest and costs, exceeds the minimum jurisdictional limits of this Court.

11. Venue is proper in Harris County, Texas because it is the county in which all or a substantial part of the events or omissions giving rise to the claim occurred.

## IV.

## FACTUAL BACKGROUND

12. From 1986 through 1988, Westwood Savings & Loan Association ("Westwood") owned the Fondren Green Apartments in Houston, Texas. Westwood hired H.R. Management Co. to manage the apartment complex during part of 1986.

13. In 1988, tenants and employees of the Fondren Green Apartments commenced litigation against, among others, Westwood and H.R. Management for personal-injuries allegedly caused by the spraying of a restricted use chemical known as chlordane at the apartment complex (the "Fondren Green litigation").

14. In 1993, counsel for the Fondren plaintiffs offered to settle with H.R. Management for the combined limits of H.R. Management's liability insurance policies with Atlantic Mutual, Atlantic Lloyd's and Centennial.

15. The Atlantic Lloyd's policy had limits of $300,000 with no aggregate limit. The two Centennial policies had limits of $10,000,000 and $15,000,000, respectively.

16. Faced with certain liability and a finding of gross negligence and punitive damages, Defendants sought to misrepresent the amount of liability insurance available and induce the Fondren plaintiffs to settle for a substantially lower amount than policy limits. Defendants conspired to misrepresent that coverage under the $15,000,000 Centennial policy had been denied.

17. Contrary to Defendants' misrepresentations, coverage under the $15,000,000 Centennial policy had not been denied. In fact, most, if not all, of the settlement monies paid by Defendants came from the $15,000,000 Centennial policy.

18. During all relevant times, Westwood was a named insured under a general liability policy issued by Zurich. During the course of the Fondren Green litigation, Westwood sought coverage for indemnity and defense under this policy. Zurich agreed to defend Westwood in connection with the Fondren Green litigation.

19. Although H.R. Management was a named insured under several other primary and umbrella policies issued by Defendants, H.R. Management sought coverage for defense and indemnity under one or more of the general liability policies issued by Zurich.

20. Zurich agreed to defend H.R. Management against the claims asserted in the Fondren Green litigation subject to a reservation of rights and in accordance with the terms and conditions of the applicable policies. In doing so, Zurich paid for legal services rendered by the law firms of Vial, Hamilton, Koch & Knox and Dunn, Kacal, Pappas & Law in defense

of H.R. Management (these law firms and the individual lawyers providing the legal services from these law firms will sometimes collectively be referred to as the "Defense Lawyers"). Thus, as a result of H.R. Management's alleged spraying of Chlordane at the Fondren Green Apartments, Zurich provided a defense to both Westwood and H.R. Management.

21. During the relevant period of time, H.R. Management was also provided a defense by the Defendants. In so doing, the Defendants paid for the legal services of the Defense Lawyers.

22. During all relevant times, H.R. Management denied that it engaged in any wrongful or criminal conduct in connection with its management of the Fondren Green Apartments.

23. Unbeknownst to Zurich, however, H.R. Management, through its various employees, engaged in willful, intentional, and criminal activities in connection with its management of the Fondren Green Apartments. Not only was H.R. Management aware of this willful and criminal conduct, but so also were the Defendants and the Defense Lawyers.

24. Indeed, one or more of the Defense Lawyers wrote detailed reports to the Defendants informing them of the willful and criminal conduct of H.R. Management. Some of the willful and criminal conduct reported to the Defendants included the following:

> Clara Tanner, the H.R. Management employee responsible for choosing the chlordane, knew before any was applied in the apartments that it was improper and even ***criminal*** to use the substance indoors.

H.R. Management obtained the chlordane for use in the apartments by affirmatively ***lying*** to the supplier as to how the material was to be used.

Federally-imposed labeling guidelines for chlordane products would have disclosed that H.R. Management's method for application of the product was improper, and that the material was ***dangerous*** and ***poisonous***.

Under applicable regulations, the chlordane, once obtained, should only have been applied by licensed pesticide applicators and not by the ***untrained*** and ***unsupervised*** workers that H.R. Management actually used.

That there was an 80 percent probability that H.R. Management had been grossly negligent. (*See generally* attached memorandum.)

This material and incriminating information was intentionally concealed from Zurich by the Defendants in order to induce Zurich to contribute to H.R. Management's defense costs and obstruct Zurich's attempts to settle with the Fondren plaintiffs. Indeed, the scheme originally envisioned that Defendants would cease all defense of H.R. Management and leave Zurich holding the bag.

25. This willful and criminal conduct, if timely known by Zurich, would have provided Zurich with a basis for denying coverage for all claims related to H.R. Management's conduct under their applicable policies. Additionally, Zurich's insured, Westwood, had rights of indemnification, breach of contract, and other claims against Defendants and Zurich held rights of subrogation. If Zurich had known the

truth, the Defendants would have borne all the finalcial burden of the Fondren Green litigation.

26. The Defendants then set out on a course to extort even more money from Zurich. In that regard, H.R. Management, with the authorization and funding of the Defendants, commenced protracted and expensive litigation against Zurich in a Dallas Federal court action, claiming that H.R. Management was unfairly treated by Zurich.

27. Zurich was forced to hire legal counsel to defend itself against the baseless claims filed in the Dallas federal court action. Zurich retained the legal services of attorney, James W. Walker ("Walker"). In an effort to place added financial pressure on Zurich to settle meritless claims, the Defendants forced Walker to withdraw from his representation of Zurich in the Dallas federal case a short time before trial.

28. The Defendants, knowing that the Dallas federal case was a baseless case against Zurich, employed this tactic in the hopes it might extract a settlement from Zurich. Zurich refused to give up its fight against the spurious claims. However, as a result of the Defendants' scheme, Zurich was forced to employ a new law firm on the eve of trial and incur significant legal expenses in the process.

29. During the course of the Dallas federal case, in 1996, Zurich first discovered that Defendants had committed the acts of fraud and breach of duty herein described. It was also in 1996 that the Fondren plaintiffs became aware of the fraud practiced upon them.

V.

CAUSES OF ACTION

*Count One: Fraud and Conspiracy to Defraud*

30. The foregoing allegations are incorporated by reference.

31. Defendants, acting alone and in complicity with others, falsely misrepresented material facts to the Fondren plaintiffs with the intent to induce them to settle their claims for at least $15,000,000 less than settlement value. The Fondren plaintiffs entered into a settlement agreement with Defendants after relying upon Defendants' fraudulent misrepresentations.

32. Defendants, acting alone and in complicity with others, also committed one or more acts of fraud for the purpose of securing insurance benefits from Zurich to which they were not entitled. These acts of fraud also delayed Zurich's ability to effect settlement on behalf of Westwood.

33. Defendants, acting alone and in complicity with others, committed one or more acts of fraud for the purpose of inducing Zurich to forego or compromise indemnity rights.

34. As a direct and proximate result, Plaintiffs have sustained damages far in excess of this Court's jurisdictional requirements.

*Count Two: Subrogation*

35. The foregoing allegations are incorporated by reference.

36. Zurich hereby asserts against Defendants all its subrogation rights flowing through Westwood for fraud, breach of contract, breach of fiduciary duty, and negligence arising out of and related to the management of the Fondren Green Apartments. Zurich alleges the discovery rule and estoppel as to any pleas of limitation.

37. Zurich seeks as additional compensation all reasonable attorneys' fees and punitive damages.

***Count Three: Wrongful Inducement to Breach Fiduciary Duty***

38. The foregoing allegations are incorporated herein by reference.

39. Under the insurance policy, Zurich provided a defense to H.R. Management. This defense was provided through the Defense Lawyers.

40. The Defense Lawyers were, therefore, acting as subagents for Zurich until such time as the Zurich policy was exhausted. As such, they owed various fiduciary obligations to Zurich including the duty to disclose to Zurich any and all material information bearing upon the liability of H.R. Management in the Fondren Green litigation.

41. Knowing that the Defense Lawyers had fiduciary obligations to Zurich, the Defendants negligently, recklessly, or intentionally induced the Defense Lawyers to favor Defendants over Zurich and this included concealing from Zurich material information concerning the wrongful and criminal conduct of H.R. Management that Defense Lawyers did make known to Defendants.

42. As a result of this wrongful inducement by the Defendants, Zurich has been damaged in an amount in excess of the minimum jurisdictional limits of this Court.

***Count Four: Tortious Interference with the Insurer/Insured Contract***

43. The foregoing allegations are incorporated herein by reference.

44. H.R. Management was an insured under a policy issued by Zurich. Accordingly, H.R. Management had a contractual duty to cooperate with Zurich.

45. The Defendants intentionally and/or recklessly interfered with this contract.

46. As a result of the Defendants' tortious interference, Zurich has been damaged far in excess of the minimum jurisdiction limits of this Court.

***Count Five: Tortious Interference with Insurer/ Defense Lawyers' Contract***

47. The foregoing allegations are incorporated herein by reference.

48. Zurich contracted with the Defense Lawyers to provide a defense to H.R. Management in the Fondren Green litigation.

49. Pursuant to that agreement, the Defense Lawyers were required to disclose to Zurich any and all material information bearing upon the liability of H.R. Management in the Fondren Green litigation.

50. The Defendants intentionally and/or recklessly interfered, by and through its employees, with the Defense Lawyers' contractual duties to Zurich.

51. As a result of the Defendants' tortious interference, Zurich was unnecessarily required to, among other things, pay defense costs on behalf of Westwood and H.R. Management and pay indemnity costs on behalf of Westwood. Zurich's damages are far in excess of the minimum jurisdiction limits of this Court.

***Count Six: Tortious Interference with Contract Between Insurer and Insurer's Counsel***

52. The foregoing allegations are incorporated herein by reference.

53. Zurich entered into a contract with Walker to defend Zurich against the baseless claims brought by H.R. Management and the Defendants in the Dallas federal court case.

54. The Defendants intentionally interfered with this contractual relationship between Walker and Zurich by claiming, without support, that a conflict required the withdrawal of Walker from his representation of Zurich in the Dallas federal case. Although the Court in the Dallas federal case found no conflict of interest, Walker withdrew his representation of Zurich based on the continued economic pressure and threats of the Defendants.

55. As a result of the Defendants' tortious interference, Zurich was required to incur significant legal expense in hiring a new law firm to defend Zurich against the claims in the Dallas federal case. As a result of this tortious interference, Zurich has suffered damages in excess of $100,000.

***Count Seven: Civil Conspiracy and Unlawful Trade Practices***

56. The foregoing allegations are incorporated by reference.

57. With the intent of inflicting financial harm on Zurich, Defendants induced H.R. Management, an alleged policyholder of Zurich, to assign rights under the policy to Defendants.

58. Such assignments are contrary to the public policy of Texas and constitute wrongful and illegal acts.

59. These types of illegal assignments are created to manufacture claims against insurance carriers and cause insurance carriers to incur substantial costs in defense of extortionate claims brought by policyholders who have, in fact, sustained no damage, such as the case at bar.

60. Not only does this conduct have a direct effect on the finances of an insurance carrier, it also creates an unfair competitive advantage when such illegal devices are used by competitors such as Defendants to shift the risk of loss from their own policies to the policies of innocent carriers.

61. Defendants, acting together and in concert with others, conspired to perform illegal acts or, alternatively, conspired to perform legal acts through illegal means.

62. As a direct and proximate result, Zurich has sustained damages far in excess of the jurisdictional limits of this Court.

*Count Eight: Insurance Code Violations*

63. The foregoing allegations are incorporated by reference.

64. By misrepresenting to the Fondren plaintiffs that coverage under the $15,000,000 Centennial policy had been denied, Defendants violated Article 21.21, §4(11) of the Texas Insurance Code.

65. Defendants knowingly misrepresented an insurance policy in violation of Texas law.

66. Pursuant to Article 21.21, §16 of the Texas Insurance Code, Plaintiffs seek actual damages, court costs and reasonable and necessary attorney's fees sustained as a result of this conduct. Plaintiffs also seek statutory damages of three times the amount of actual damages.

VI.

EXEMPLARY DAMAGES

67. The conduct described herein was performed wantonly and in utter disregard of Plaintiffs' rights. Plaintiffs seek punitive damages of not less than $55,000,000.

VII.

PRAYER

WHEREFORE, Plaintiffs pray that, upon the final hearing of this case, they be awarded a judgment against the Defendants, jointly and severally, for monetary relief in excess of the minimum jurisdictional limits of this Court, prejudgment and post-judgment interest, reasonable attorneys' fees, costs, and such and other further

relief to which Plaintiffs may show themselves justly entitled.

Respectfully submitted,

/s/ Werner A. Powers
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90-2343-SSH

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

MELVIN J. THORNTON, ET AL.,

Plaintiffs,

v.

FONDREN GREEN, ET AL.,

Defendants.

STATUS REPORT

This is a confidential report prepared by attorneys at the direction of their client in conjunction with the above-styled matter. Its contents are confidential attorney work product and subject to the attorney-client privilege.

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# I.
# INTRODUCTION

This case, which arises from the allegedly improper spraying of chlordane in various apartments within the Fondren Green Apartment complex in Houston, Texas, pends for trial before the United States District Court for the Southern District of Texas in August 1992 and for possible informal mediation within the next 30 to 45 days. The purpose of this report is to provide capsule information concerning the most important aspects of this claim and its environment, and to provide tentative opinions concerning possible settlement or litigation values of the case in the event of mediation or trial.

To this end, this report is divided into several sections. First, we discuss the present alignment of the parties, their attorneys and the respective positions taken by those parties in the pleadings. In the next section, we discuss in capsule form the law of the State of Texas as it applies to this matter with particular emphasis on the submissibility of punitive damage claims and the possibility that these claims are insurable under Atlantic's insurance policies. In the following section we address liability facts and the likelihood that Plaintiffs will prevail on their pleaded theories of liability and aggravated liability. After this discussion, the next section addresses issues relating to causation and damages, including the medical and damage issues raised by the Plaintiffs.

Throughout this resport, references will be made at various intervals to the *Cordova* case, another chlordane exposure case which was tried to judgment in the State District Courts in Houston, Texas. *Cordova* is an excellent comparison case for analysis in this action. Refer-

ences to "*Cordova*" or to "*Cordova/Flores*" refer to this case.[1]

Summarizing this capsule report in an even briefer fashion, we believe that there is a better than 80 percent chance that a jury will find the H.R. Management Defendants negligent and grossly negligent in this case based upon applicable Texas law and the facts as presently known to us. We believe that any apportionment of liability among defendants will result in 60-80% of liability being apportioned to H.R. Management. We rate Plaintiffs' overall chance of recovery, that is, of recovering damages based upon these liability findings, as being between 50 and 70 percent. Based upon the individual damage computations found later in this report, we believe that the most likely range for total exposure presented by the 22 claims in this case is $9,840,000.00 to $22,850,000.00. Multiplying this figure by Plaintiffs' 60 to 80 percent chances of success, we believe that the case has a settlement value in the range of $7,880,000.00 to $17,480,000.00.

It is exceptionally difficult for us to prognosticate the reliability of these values or the likelihood that they will emerge at trial. Toxic tort cases pose almost uniquely difficult problems to an evaluator because the injuries alleged develop over an extremely long period and because the scientific evidence supporting the development of injury primarily rests upon primitive and imprecise studies as statistical correlation. Thus, we must advise that there is an unusually wide margin for error in these assessments.

---

[1] The *Cordova* parties agreed to try a group of test Plaintiffs on various issues relating to liability and damage, and this group received designation as the "Flores group" of Plaintiffs. Hence the use of two names with regard to this case.

Overall, in reaching our conclusions, we found the following facts to be most significant:

1. Clara Tanner, the H.R. Management employee responsible for choosing the chlordane, knew before any was applied in the apartments that it was improper and even criminal to use the substance indoors.
2. H.R. Management obtained the chlordane for use in the apartments by affirmatively lying to the supplier, Wolfe Nurseries, as to how the material was to be used.
3. Federally-imposed labeling guidelines for chlordane products would have disclosed that H.R. Management's method for application of the product was improper, and that the material was dangerous and poisonous.
4. Under applicable regulations, the chlordane, once obtained, should only have been applied by licensed pesticide applicators and not by the untrained and unsupervised workers that H.R. Management actually used.

## DAMAGES

| *Name* | *Type** | *Emotional* | *Physical* |
|---|---|---|---|
| Butler | R | 25-50,000 | n/a |
| Cauley | R | 25-50,000 | n/a |
| Godwin, D. | R | 25-500,000 | n/a |
| Godwin, G. | R | 300-600,000 Total | |
| Grow | R | 25-50,000 | n/a |
| Hardy | E | 25-50,000 | n/a |
| May | R | 25-50,000 | n/a |
| Pickerell, D. | R | 25-50,000 | n/a |
| Pickerell, D. | R | 150-1,000,000 Total | |
| Pickerell, N. | R | 25-50,000 | n/a |
| Pinada | E | 25-50,000 | n/a |
| Savage (Martinez) | R | 300-600,000 Total | |
| Schnacke | R | 25-50,000 | n/a |
| Scott | R | 25-50,000 | n/a |
| Self, A. | R | 25-50,000 | n/a |
| Self, C. | R | 25-50,000 | n/a |
| Stafford | R | 75-240,000 | |
| Thomas | R | 25-50,000 | n/a |
| Thompson | R | 25-50,000 | n/a |
| Thornton | R | 25-50,000 | n/a |
| Washington | E | 25-50,000 | n/a |

---

* R = Resident, E = Employee

## DAMAGES

| *Monitoring* | *Punitive* | *Total* |
|---|---|---|
| 40-60,000 | 260-440,000 | 325-550,000 |
| 40-60,000 | 260-440,000 | 325-550,000 |
| 40-60,000 | 260-440,000 | 325-550,000 |
| | 1,200-2,400,000 | 1,500-3,000,000 |
| 40-60,000 | 260-440,000 | 325-550,000 |
| 40-60,000 | 260-440,000 | 325-550,000 |
| 40-60,000 | 260-440,000 | 325-550,000 |
| 40-60,000 | 260-440,000 | 325-550,000 |
| | 600-4,000,000 | 750-5,000,000 |
| 40-60,000 | 260-440,000 | 325-550,000 |
| 40-60,000 | 260-440,000 | 325-550,000 |
| | 1,200-2,400,000 | 1,500-3,000,000 |
| 40-60,000 | 260-440,000 | 325-550,000 |
| 40-60,000 | 260-440,000 | 325-550,000 |
| 40-60,000 | 260-440,000 | 325-550,000 |
| 40-60,000 | 260-440,000 | 325-550,000 |
| 40-60,000 | 460-1,200,000 | 575-1,500,000 |
| 40-60,000 | 260-440,000 | 325-550,000 |
| 40-60,000 | 260-440,000 | 325-550,000 |
| 40-60,000 | 260-440,000 | 325-550,000 |
| 40-60,000 | 260-440,000 | 325-550,000 |

## APPENDIX I

[Filed 3-19-93]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CA NO. H911673

MELVIN J. THORNTON, ET AL.,

Plaintiffs,

vs.

FONDREN GREEN APARTMENTS, ET AL.,

Defendants.

JOINT MOTION TO APPROVE SETTLEMENTS AND TO DISMISS PLAINTIFFS' CLAIMS AGAINST H.R. MANAGEMENT CO.

COME NOW, Plaintiffs Sue Butler, Sheila Cauley, Brad Godwin, Gayle Godwin, individually and as personal representative of the Estate of Paul Godwin, Deceased, Delores Hardy, Marilyn Savage Martinez, as personal representative and legal guardian of Helen Jan Savage, Thomas J. May, Dean Pickrell, Nicola Pickrell, Isaac Pineda, David Schnake, Ronald Scott, Alta Self, Clifton Self, William Stafford, Mary Thomas, Diane Thompson, and Ollie Mae Washington (hereinafter sometimes referred to as "Plaintiffs"), and Defendant H.R. Management Co. (collectively referred to as "Movants"), pursuant to Rule 41(a) Fed. R. Civ. P. for orders of this Court approving

settlements on behalf of Helen Jan Savage, an incompetent adult, and dismissing all of the foregoing Plaintiffs' claims herein against H.R. Management Co. In support thereof, Movants state:

1. By separate written Full and Final Release and Indemnity Agreements (the "Agreements"), the foregoing Plaintiffs, individually or through their legal representatives, have compromised and settled all of their claims against H.R. Management Co. and have executed the agreements under oath releasing H.R. Management Co. and its insurers from Plaintiffs' claims and causes of actions asserted in the above-styled matter. Each Plaintiff has received good and valuable consideration from H.R. Management Co. and its insurers in exchange for the agreements to settle and release all claims and causes of action against H.R. Management Co. with prejudice to Plaintiffs to refile all or any part thereof.

2. To consummate the settlement and release of the claims of Helen Jan Savage, an incompetent adult, through her legal representative, Movants request that the Court conduct a hearing to confirm that Marilyn Savage Martinez has authority to settle on behalf of Helen Jan Savage and to approve the terms of the settlements and releases as memorialized by the agreement executed on behalf of Helen Jan Savage. The consideration to be paid to Helen Jan Savage on behalf of H.R. Management Co. is good, valuable and reasonable consideration, and it is in the best interest of Plaintiff Savage for the Court to approve this settlement and agreement on her behalf as to H.R. Management Co., its affiliated companies, and its officers, agents, employees and insurers, including, but not limited to, Atlantic Lloyds Insurance Co. and all other persons, firms and corporations to whom and for whose conduct the parties hereby released may be liable.

3. Subject to the Court's approval of the settlements and agreements on behalf of Helen Jan Savage, the foregoing Plaintiffs, upon the payment by H.R. Management Company of Plaintiffs' court costs have no claims remaining herein against the parties being released, and the Movants request that the Court grant this motion to dismiss Plaintiffs' claims and causes of action against H.R. Management Co., with prejudice to refile all or any part of such claims, and to approve the releases of all claims against the parties released and set forth in the agreements.

WHEREFORE, Movants pray for an Order of the Court consistent with this Motion.

Respectfully submitted,

/s/ David Prince
David Prince
State Bar No. 16328600
5104 Scotland
Houston, Texas 77007-7239

O'QUINN, KERENSKY & McANINCH
440 Louisiana, Suite 2300
Houston, Texas 77002
John M. O'Quinn
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VIAL, HAMILTON, KOCH & KNOX
1717 Main Street, Suite 4400
Dallas, Texas 75201-4605
(214) 712-4400
FAX (214) 712-4402

By: /s/ Thomas B. Alleman
Thomas B. Alleman
State Bar No. 01017485

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above and foregoing instrument has been served on all counsel of record on this the 19th day of March, 1993, via certified mail, return receipt requested.

/s/ Thomas B. Alleman
Thomas B. Alleman

## APPENDIX J

[Filed MAR 19 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CA NO. H911673

MELVIN J. THORNTON, ET AL.,

Plaintiffs,

vs.

FONDREN GREEN APARTMENTS, ET AL.,

Defendants.

## O R D E R

Came on for consideration in this consolidated action a Joint Motion to Approve Settlements and to Dismiss Plaintiffs' Claims Against H.R. Management Co. ("the Joint Motion"). The Court is of the opinion the Joint Motion is well taken and should be granted in its entirety. With respect to Plaintiff Helen Jan Savage, an incompetent adult, the Court has conducted a hearing to confirm the authority of Helen Jan Savage's legal representative to settle on her behalf. The Court has reviewed the terms of the Settlement and Release of All Claims of Plaintiff Helen Jan Savage as to H.R. Management Co., Atlantic Lloyds Insurance Company of Texas, and the other entities named in the Release and Settlement Agreement,

their respective past and present officers, directors, managing agents, attorneys, servants, employees, agents, and other representatives, their predecessors, successors, and assigns, their underwriters and insurers, and any other person or legal entity in privity with any of them (collectively referred to as the "Releasees"). The Court finds that the legal representatives who have executed under oath the written Settlement Agreement and Release (the "Agreements") on behalf of Helen Jan Savage have authority to do so and that such Settlement and Release are to the benefit of and in the best interest of Helen Jan Savage. It is, therefore,

ORDERED, that the settlements and releases of all claims of Plaintiff of Helen Jan Savage, an incompetent adult, as embodied in the separate Agreements executed on her behalf, are hereby approved. It is further

ORDERED that the Joint Motion to dismiss the claims of Melvin J. Thornton, Sue Butler, Sheila Cauley, Brad Godwin, Gayle Godwin, individually and as personal representative of the Estate of Paul Godwin, Deceased, Delores Hardy, Marilyn Savage Martinez, as personal representative and legal guardian of Helen Jan Savage, Thomas J. May, Dean Pickrell, Nicola Pickrell, Isaac Pinada, David Schnake, Ronald Scott, Alta Self, Clifton Self, William Stafford, Mary Thomas, Diane Thompson, and Ollie Mae Washington which have been brought or which might have been brought herein is in all things granted. Accordingly, upon the payment of Plaintiff's court costs all claims and causes of action of each Plaintiff named herein against H.R. Management Co. brought or which might have been brought herein are hereby in all things dismissed with prejudice to each Plaintiff's right to

refile all or any part thereof with costs through date of this Order to be paid by Defendant H.R. Management Co.

Signed: March 19, 1993.

/s/ John D. Rainey
JUDGE PRESIDING

APPROVED AS TO FORM AND
SUBSTANCE AND ENTRY REQUESTED:

/s/ David S. Prince
David S. Prince

/s/ Thomas B. Alleman
Thomas A. Alleman

## APPENDIX K [Sample]

### RELEASE AND INDEMNITY AGREEMENT

STATE OF TEXAS
COUNTY OF HARRIS

In consideration of the sum of Two Hundred Thousand and 00/100 Dollars ($200,000.00), the receipt and sufficiency of which is hereby acknowledged and confessed, I, Sue Butler, have RELEASED, ACQUITTED, and FOREVER DISCHARGED, and by these presents do for myself, my heirs, executors, administrators, successors, and assigns, RELEASE, ACQUIT, AND FOREVER DISCHARGE H.R. Management Co., all its affiliated companies, parent companies, subsidiaries, officers, agents, and employees, its insurer Atlantic Lloyds Insurance Co., and all its affiliated companies, officers, agents, and employees, from all existing, future, known, and unknown claims, demands, and causes of action for all existing, future, known, and unknown damages and remedies which may have accrued or may ever accrue to me or to my heirs, executors, administrators, legal representatives, successors, or assigns, for or on account of the injuries that occurred or may occur during or as a result of my tenancy at the Fondren Green Apartments, including but not limited to injuries associated with or alleged to have arisen from my alleged exposure to the pesticide Chlordane, including but not limited to all claims, demands, and causes of action of any nature, whether in contract or tort, or arising under or by virtue of any statute or regulation, that are now recognized by law or that may be created or recognized in the future by any manner, including without limitation by statute, regulation, or judicial decision, for past, present, future,

known, and unknown personal injuries, property damage, and all other losses, damages, or remedies of any kind that are now recognized by law or that may be created or recognized in the future by any manner, including without limitation by statute, regulation, or judicial decision, including but not limited to the following: all actual damages, all exemplary and punitive damages, all penalties of any kind, loss of consortium, familial relations, ensuing death, loss of inheritance, loss of companionship, loss of society and affection, loss of enjoyment of life, emotional distress of any kind including but not limited to cancer phobia, and pre- and post-judgment interest.

I understand that I have made claims for injuries which are latent or which may arise at uncertain dates or times in the future and that this settlement agreement specifically contemplates resolving all claims and demands of any type or nature that may relate to such future injuries, damages, or losses. I have specifically discussed this matter with my attorneys and agree that I am releasing hereby and that this document should be construed as to release those future claims, losses, and damages.

The aforementioned consideration is accepted by the undersigned in full satisfaction of all damages to the undersigned arising out of said incident. The payment of said parties released herein is not to be construed as an admission of liability, which has been denied, and this document or this settlement it described shall not be construed as evidence of any liability on the part of H.R. Management Co. or as an admission by H.R. Management Co. of any of the facts or allegations made by me. This Release is entered into solely for convenience of the parties to resolve doubtful and disputed litigation.

I have heretofore brought suit in the United States District Court for the Southern District of Texas, Houston Division, in Cause No. H-911673, to recover damages sustained by me as a result of the above-described incident. I understand that H.R. Management Co., in consideration of the full and final settlement of said suit as to wit, agrees to pay my court costs up to the date of settlement, and I agree that any settlement agreement I enter into with H.R. Management Co. will be conditioned upon H.R. Management Co. paying all court costs, including those incurred up to the date of the settlement. The consideration mentioned above is accepted by me in full compromise and settlement of all claims and causes of action for personal injuries and property damage being asserted against H.R. Management or which might have been asserted against H.R. Management Co.

As a part of the consideration for the payment of the above-mentioned sum and the parties hereby released, I am expressly warranted and represented and do hereby for myself, my heirs, legal representative, and assigns, expressly warrant and represent to each and all of the parties hereby release that:

(1) I am legally competent to execute this Agreement and Release;

(2) All hospital, medical, and other expenses or liens of any and every nature and character whatsoever incurred by me or on my arise arising from the said incident described above have been paid in full; and upon request, I will furnish evidence to the parties hereby released of the payment in full by me of all expenses and bills;

(3) I have not assigned, pledged, or otherwise in any manner whatsoever sold or transferred either by

instrument in writing or otherwise any right, title, interest, or claim that I have or may have by reason of the accident described above or any matters arising out of or related thereto except to my counsel named in this instrument, Mr. David S. Prince and/or Mr. John O'Quinn or their respective law firms.

As a part of the consideration for the payment of the above sum of money, I, for myself, my heirs, executors, administrators, and assigns, have agreed to and do hereby indemnify Defendant and hold harmless each and all of the parties hereby released from any and all claims, demands, actions, or causes of action of whatsoever nature and character, including all costs, expenses, attorneys' and legal fees in defending same which may have been or which may hereafter be asserted by any person, firm, or corporation claiming by, through, or under me in any manner connected or arising out of the above-described events.

I expressly warrant and represent to the parties hereby released and to each of them as a part of the consideration for the payment of the above-mentioned sum of money that before executing this instrument, I have fully informed myself of its terms, contents, conditions, and effect; that in making this settlement I have had the benefit of the advice of doctors and attorneys of my own choosing; and no promise or representation of any kind has been made to me by the parties hereby released or by anyone acting for them, except as is expressly stated in this instrument. I have relied solely and completely upon my own judgment, and the advice of my counsel in making this settlement; and I fully understand that this is a full, complete, and final release, and that the sum of money mentioned above is all the money that is

to be paid to me by H.R. Management Co. as a result of the herein-described accident.

Executed in multiple originals on March 4, 1993.

/s/ Sue Butler

I, David S. Prince, one of the attorneys and counsel for Sue Butler, do hereby acknowledge that the foregoing Release was fully and completely explained to him/her prior to the execution thereof, acknowledged receipt of all legal fees due in connection with this settlement out of the sum of money mentioned above.

/s/ David S. Prince
David S. Prince
Attorney for Sue Butler

STATE OF TEXAS §
§
COUNTY OF HARRIS §

Before me, the undersigned authority, on this day personally appeared Sue Butler, known by me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he/she executed the same for the purposes and consideration therein expressed. Given under my hand and seal of office on March 4, 1993.

/s/ Linda S. Ross
Notary Public in and for the State of Texas

Printed Name of Notary:
LINDA S. ROSS

My commission expires:
May 30, 1995

---

STATE OF TEXAS §
§
COUNTY OF HARRIS §

Before, the undersigned authority, on this day personally appeared David S. Prince, counsel for Sue Butler, known by me to the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and consideration therein expressed and the capacity therein stated for and on behalf of all counsel for Sue Butler. Given under my hand and seal of office on March 4, 1993.

/s/ Linda S. Ross
Notary Public in and for the State of Texas

Printed Name of Notary:
LINDA S. ROSS

My commission expires:
May 30, 1995

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Supreme Court, U.S.
FILED
DEC 21 1998
OFFICE OF THE CLERK

No. 98-774

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

ATLANTIC LLOYD'S INSURANCE COMPANY OF TEXAS, ATLANTIC MUTUAL INSURANCE COMPANY, CENTENNIAL INSURANCE COMPANY, H.R. MANAGEMENT COMPANY, HARRY W. REED, and GRAYSTAR MANAGEMENT,

*Petitioners,*

*vs.*

THE ZURICH INSURANCE COMPANY and DIANNE THOMPSON,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

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## PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The petition accurately lists the parties to the proceeding.

The parent of Respondent The Zurich Insurance Company is Zurich Insurance Company. There are no nonwholly owned subsidiaries of Respondent The Zurich Insurance Company.

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## STATEMENT OF THE CASE

### A. The Parties and the Underlying Cases.

This proceeding arises from two consolidated toxic tort cases (the "Chlordane Case") brought in 1988 and 1989 in state court in Houston, Texas, which were removed to the United States District Court for the District of Columbia in 1990 and then transferred to Judge John Rainey in the Southern District of Texas, Houston Division, in 1991. The Chlordane Case, which involved many parties who settled at different points in time, concluded with a final judgment entered March 23, 1993.

Thereafter, in 1996, Respondents and others brought suit in state court in Harris County, Texas, complaining of fraud arising out of the settlement reached in the Chlordane Case (the "Fraud Case"). Petitioners' removal of the Fraud Case gave rise to the appellate ruling here in issue.

The parties to the final judgment in the Chlordane Case, which was entered pursuant to a settlement, included Respondent Dianne Thompson and Petitioner H.R. Management Company ("HRM").

The Atlantic Insurance Companies were insurers, not parties, in the Chlordane Case and are defendants in the Fraud Case and Petitioners herein. The other defendants in the Fraud Case are Petitioners HRM, Harry Reed (HRM's owner), and Graystar Management (HRM's successor in interest). Respondent The Zurich Insurance Company ("Zurich") was an insurer, not a party, in the Chlordane Case on behalf of HRM and others, and Zurich joined Respondent Dianne Thompson and others as a plaintiff in the Fraud Case.

**B. Course of Proceedings Below.**

The Respondents, along with the other plaintiffs, filed the Fraud Case in state court in Harris County, Texas, on or about October 4, 1996. Substantially all of the plaintiffs were citizens of Texas. Named as defendants were Petitioners Atlantic, Centennial, and Atlantic Lloyd's. Also named as defendants in the Fraud Case were HRM, HRM's owner, Harry Reed, and HRM's successor in interest, Graystar Management. All of the defendants in the Fraud Case were citizens of Texas except for Atlantic and Centennial. The plaintiffs alleged a number of state law claims. No federal claims were asserted. *See generally* Petition, App. H at 27a-49a (Plaintiffs' First Amended Original Petition in the Fraud Case).

This jurisdictional dispute arose because of Count One of the Original Petition. By Count One, Respondents alleged that the Petitioners had fraudulently induced them to settle the Chlordane Case for at least $15 million less than its settlement value. No equitable relief was sought in Count One, only damages. Petition, App. H at 36a.

On or about November 1, 1996, Petitioners removed the Fraud Case to the United States District Court for the Southern District of Texas. The removal papers claimed, *inter alia*, that Count One by the Respondents was barred by an earlier federal judgment entered pursuant to a settlement in the Chlordane Case. The Fraud Case was assigned to Judge Melinda Harmon. Judge Harmon did not transfer the Fraud Case to Judge John Rainey, who had presided over the earlier Chlordane Case. Nor was the Chlordane Case administratively reopened and consolidated with the Fraud Case.[1]

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1. Respondents note that, were supplemental jurisdiction the operative concept, then the state law claims alleged in the Fraud Case

(Cont'd)

On November 27, 1996, Respondents filed a Motion and Brief to Remand in the Fraud Case. Respondents alleged, *inter alia*, that they were not seeking to set aside a federal settlement or a federal judgment; that, under *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994), the Southern District had no supplemental jurisdiction over settlements in the Chlordane Case; that *ALFAB, Inc. v. CNA Financial Corp.*, 877 F. Supp. 1538 (M.D. Ala. 1995), decided post-*Kokkonen*, was directly on point; that no federal question was alleged in the Fraud Case; and that there was no diversity jurisdiction.

On April 21, 1997, the district court entered its order denying remand. *See* Petition, App. B at 5a-9a. The district court found that Count One was an "artful" attempt to attack a federal judgment; that an action in state court attacking a federal judgment involves a "federal question" invoking the original jurisdiction of federal courts; that there is no discernable difference between an action for fraud seeking damages and an action seeking to set aside a judgment; and that *Kokkonen* limits the jurisdiction of courts to enforce settlements but is inapplicable to fraud cases, where "[f]ederal jurisdiction is even more essential." *Id.* at 7a-8a. The district court also, *sua sponte*, ordered Respondents to replead under Rule 60, FED. R. CIV. P., within 15 days or face dismissal of their claims.

Respondents refused to replead because they would not be forced to plead into the jurisdiction of the district court and

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(Cont'd)
should have been appended to the Chlordane Case before Judge Rainey. Presumably this would have required a transfer and consolidation of the Fraud Case with the closed Chlordane Case. By attempting to maintain jurisdiction over the state law claims in her court, Judge Harmon relied solely on original, federal question jurisdiction over the state law claims in the Fraud Case. *See* discussion of *Rivet v. Regions Bank of La.*, __ U.S. __, 118 S. Ct. 921 (1998) and the well-pleaded complaint rule, *infra*.

because they believed that Rule 60 was an optional remedy even if the district court had original jurisdiction. Further, Rule 60 would have required a motion to be filed in Judge Rainey's Court in the Chlordane Case, which had never been reopened or consolidated with the Fraud Case. The district court, on August 6, 1997, entered an order that summarily disposed of all of the claims then alleged in Respondents' state court petition. Of particular importance to this proceeding, the district court, acting without motion, notice, hearing or evidence, dismissed with prejudice Zurich's fraud claim under Count One of the Petition. The sole reason given was that Respondents had failed to replead Count One under Rule 60. Zurich was not a party to the Chlordane Case, or to the HRM settlement and judgment in the Chlordane Case, and, therefore, could not possibly seek relief under Rule 60.

After the district court denied remand, Respondents sought mandamus relief in the court of appeals, seeking (i) the reversal of the district court's April 21, 1997 order denying remand and (ii) an order of remand from the court of appeals. In its June 2, 1998 order reversing and vacating the district court's order denying remand, the court of appeals noted the following key facts of importance to this appeal:

1. The district court's order of dismissal in the Chlordane Case "did not adopt or approve the terms of the settlement" entered into by the parties;

2. The fraud alleged in the Fraud Case "was practiced upon the parties, not upon the court;" and

3. The plaintiffs in the Fraud Case seek "damages for fraudulent inducement in making the

> settlement" at issue and do not attempt to "circumvent the order of dismissal" in the Chlordane Case.

Petition, App. A at 2a, 3a. The following language from the court of appeals' order is instructive:

> The present suit is one for damages for fraud. It does not seek to reopen the dismissed case nor does it question the validity of the judgment dismissing that case. It claims that the fraud was practiced upon the parties, not upon the court. Thus, our decision in *Villareal v. Brown Express, Inc.*, 529 F.2d 1219 (5th Cir. 1976) is not applicable. There we upheld removal because plaintiff was using the second state court suit to increase his personal injury recovery and to circumvent two orders of the federal court. Here plaintiffs are not trying to circumvent the order of dismissal. Rather, they allege a separate state law cause of action for which they seek damages. The issue of the first suit (whether spraying the chemical caused injury) is not at issue in the present suit for fraud.

*Id.* at 3a-4a. The court of appeals vacated the district court's order denying remand, but did not remand the case to state court because the question of diversity jurisdiction had not been addressed by the district court. *Id.* at 4a.

**C. Statement of Facts.**

The sole basis for sustaining subject matter jurisdiction in the district court was the alleged nexus between the Chlordane Case and the Fraud Case. In its order denying remand, the district court concluded that the claims in the Chlordane Case

and the claims in the Fraud Case "involve the same inquiry on the same facts and seek essentially the same damages." *See* Petition, App. B at 8a. A brief examination of the factual grounds underlying the two suits shows the error in this conclusion.

1. *The Chlordane Case*

The plaintiffs in the Chlordane Case, including Respondent Thompson, were former residents or employees at the Fondren Green Apartments in Houston, Texas. They claimed they were exposed to dangerous levels of chlordane, a highly toxic substance of which the use is strictly controlled by both state and federal authorities. *See* Petition, App. H at 31a, 33a-34a.

A description of the operative facts in the Chlordane Case is set forth in portions of a confidential status report by Vial, Hamilton, Koch & Knox, lawyers for HRM and Atlantic. Portions of this report are excerpted in the plaintiffs' petition in the Fraud Case. *See* Petition, App. H at 33a-34a, 47a. In evaluating the Chlordane Case, the lawyers for Atlantic made the following conclusions:

1. Clara Tanner, the H.R. Management employee responsible for choosing the chlordane, knew before any was applied in the apartments that it was improper and even criminal to use the substance indoors.

2. H.R. Management obtained the chlordane for use in the apartments by affirmatively lying to the supplier, Wolf Nursery, as to how the material was to be used.

3. Federally imposed labeling guidelines for chlordane products would have disclosed that H.R. Management's method for application of the product was improper and that the material was dangerous and poisonous.

4. Under applicable regulations, the chlordane, once obtained, should only have been applied by licensed pesticide applicators and not by the untrained, unsupervised workers that H.R. Management actually used.

*Id.* at 47a.

The analysis by Vial, Hamilton also contained an estimated range of damages sustained by the various plaintiffs in the Chlordane Case. At that time, the total range of damages exceeded $22,000,000. *Id.* at 46a, 48a-49a.

2. *The Fraud Case.*

The question of the existence of federal jurisdiction in the Fraud Case is determined by reference to the factual allegations of the plaintiffs' petition in the Fraud Case, which states:

Petitioner HRM had disclosed three insurance policies that were potentially applicable to the claims in the Chlordane Case. All policies were issued by the Atlantic Group. These three policies were a $300,000 policy by Atlantic Lloyd's, a $10,000,000 policy by Centennial, and an earlier $15,000,000 policy by Centennial. *Id.* at 31a. In order to induce the plaintiffs in the Chlordane Case to settle for policy limits, lawyers for the insurance carriers and HRM represented that Centennial had denied coverage under the $15,000,000 policy, that the $300,000 policy had been exhausted by earlier settlements, and

that something slightly less than $10,000,000 of policy benefits remained. *Id.* at 31a, 32a.

Years after the conclusion of the Chlordane Case, lawyers for the plaintiffs in the Chlordane Case learned that the representations on which the plaintiffs had relied were false. Centennial had not rejected coverage under the $15,000,000 policy. Indeed, the $10,000,000 used to settle the Chlordane Case on behalf of HRM was paid under the $15,000,000 policy. *Id.* at 32a.

Thus, as the court of appeals correctly noted, "[t]he issue of the first suit (whether spraying the chemical caused injury) is not at issue in the present suit for fraud." Petition, App. A at 3a-4a. The district court's contrary conclusion was clearly wrong.

## SUMMARY OF ARGUMENT

Federal courts must trust state courts to respect federal judgments. Simply because a cause of action or an item of damage pled in state court might tread upon a prior federal judgment is no excuse for inventing federal jurisdiction. State judges are competent to apply defenses of *res judicata* and collateral estoppel, and their decisions in this regard are ultimately subject to review by this Court. Indeed, in an extreme case, a federal court may issue an injunction to stop a state court from disobeying a federal judgment. Dislike or distrust of state courts does not give a federal district court the right to enlarge upon the constitutional limits of its power.

Federal jurisdiction falls into two categories: original and supplemental. Original, federal question jurisdiction is subject to the well-pleaded complaint rule in all cases except where legislation enacted by Congress has completely preempted a

field of law. Where supplemental jurisdiction exists, it necessarily comes to an end not later than the date on which the trial court loses jurisdiction over its judgment, except in those rare cases where the trial court expressly retains jurisdiction over settlements. In the case at bar, the Southern District's supplemental jurisdiction over the earlier Chlordane Case came to an end not later than thirty days after the entry of final judgment.[2] Even had Respondents wanted to invoke federal jurisdiction, they were powerless to do so. *See Kokkonen,* 511 U.S. at 378.

However, this is all irrelevant because Respondents chose to invoke only state law, as was their right. No federal question was pled, and diversity was completely lacking. If the case pled by Respondents represents an attack on a federal judgment, which clearly it does not, Petitioners are protected by affirmative defenses of *res judicata* or collateral estoppel in the state court. *See Rivet*, __ U.S. __, 118 S. Ct. at 926.

Even if attacks on federal judgments were removable, which they are not, this was not an attack on a federal judgment. Respondents did not file suit in state court in an effort to relitigate the claims alleged in the Chlordane Case. Rather, they filed suit in state court seeking damages for an alleged fraud committed by the insurance carriers who defended the Chlordane Case. Respondents did not seek to set aside a federal judgment. They did not ask for rescission of the settlement that gave rise to the federal judgment. They only asked for damages equal to the difference between what the insurance carriers paid in settlement and what they would have paid but for their fraud.

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2. The district court in the Chlordane Case did not reserve jurisdiction to enforce the parties' settlement agreement. Petition, App. J at 54a-56a. To the contrary, as the court of appeals concluded, the order "did not adopt or approve the terms of the settlement." Petition, App. A at 2a.

Nor can it be contended, as did the district court, that Rule 60 is the sole remedy for fraudulently induced settlements. The common law of Texas provides Respondent Thompson with a remedy for fraudulently induced contracts, and a settlement, even one in federal court, is a contract. Rule 60 cannot preempt the common law of Texas. Only Congress can pass legislation that preempts state law. Certainly, this Court, through its rule making authority, cannot preempt state law. Indeed, Federal Rule of Civil Procedure 82 expressly provides that the Federal Rules of Procedure cannot increase the jurisdiction of federal courts. FED. R. CIV. P. 82.

The questions Petitioners present for this Court's review must be answered against them. The first question, whether federal courts have jurisdiction over independent actions seeking damages for fraud arising from the settlement and dismissal of a prior federal action such that removal of such an action from state court is proper, is controlled by this Court's decisions in *Kokkonen* and *Rivet*.

Petitioners' second question, whether the court of appeals exceeded its jurisdiction in ruling, as part of its decision on Respondents' mandamus petition, that the district court erred in finding federal question jurisdiction of a removed case, is answered by reference to settled precedents of this Court holding that appellate courts have a special obligation to satisfy themselves of appellate and district court jurisdiction. The court of appeals' ruling that there is no federal question jurisdiction was proper, and the petition for writ of certiorari should be denied.

## REASONS FOR DENYING THE WRIT

### I.

### THIS APPEAL IS AN IMPROPER ATTEMPT TO OBTAIN APPELLATE REVIEW OF THE DISTRICT COURT'S REMAND ORDER.

After the court of appeals issued the ruling challenged by Petitioners, the district court ordered the Fraud Case remanded to state court. Petition, App. F at 15a-24a. Under 28 U.S.C. § 1447(d), remand orders in cases other than civil rights cases are not "reviewable on appeal or otherwise." The district court's order of remand forecloses appellate review of pre-remand jurisdictional rulings in the Fraud Case and moots Petitioners' appeal.[3]

The Petition is an exercise in futility. There is no relief to be granted to Petitioners because the Fraud Case has already been remanded and cannot be "unremanded." Even if the court could somehow "unremand" the Fraud Case, then the court would be doing indirectly what the law prohibits it from doing directly — reviewing an order of remand. Were the Petitioners sincere about having the opinion of the court of appeals reviewed by this Court, they could have easily moved the district court to delay its decision on whether to remand the Fraud Case pending this Court's certiorari review of the court of appeals' decision. This they did not do.

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3. *Seedman v. United States Dist. Court*, 837 F.2d 413, 414 (9th Cir. 1988) (after certification to state court, a federal court cannot vacate a remand order issued under section 1447(c)); *New Orleans Public Service, Inc. v. Majoue*, 802 F.2d 166, 167-68 (5th Cir. 1986) (same).

## II.

## THE COURT OF APPEALS CORRECTLY RULED THAT THERE IS NO FEDERAL QUESTION JURISDICTION IN THIS CASE.

### A. Petitioners misstate the record and rely on inapposite authority.

1. *Petitioners misstate the record.*

In an attempt to distance themselves from this Court's rulings in *Kokkonen* and *Rivet*, Petitioners misstate the record in this case in at least two material respects. As will be seen, these factual misstatements significantly affect the analytical framework to be applied to the legal questions presented in the Petition. Under a proper factual and legal analysis, which necessarily requires consideration of *Kokkonen* and *Rivet*, Petitioners' claims are without merit.

First, notwithstanding the plain language of the plaintiffs' petition in the Fraud Case, Petitioners describe Respondents' claims in the Fraud Case as a collateral attack on the dismissal order in the Chlordane Case. *E.g.*, Petition at 4 ("on its face Plaintiffs' suit is a collateral attack on the earlier federal court judgment of dismissal"); Petition at 19 ("regardless of how Plaintiffs denominate their claims, their suit is an independent action for relief contemplated by Rule 60(b)"). The court of appeals correctly held that Respondents "are not trying to circumvent the order of dismissal" and instead "allege a separate state law cause of action for which they seek damages." Petition, App. A at 3a.

Second, disregarding the unambiguous terms of the order dismissing the Chlordane Case, Petitioners attempt to categorize

the order as a consent decree by alleging that the district court "approved" Respondents' settlement in the Chlordane Case. *E.g.*, Petition at 5 ("Judge John D. Rainey entered an order approving the settlement"); Petition at 19 ("before seeking an additional monetary award, Plaintiffs here must set aside the *court approved settlement* and federal judgment of dismissal") (emphasis supplied). The dismissal order in the Chlordane Case was accurately characterized by the court of appeals in its finding that the order "did not adopt or approve the terms of the settlement." Petition, App. A at 2a.

2. *Petitioners rely on inapposite authority in an attempt to create a conflict among the circuits.*

Petitioners' factual mischaracterizations lead them to proffer improper legal analyses of their claims. The heart of Petitioners' argument is that there is a conflict among the circuits regarding "whether state court actions collaterally attacking the validity of a federal judgment can be removed." Petition at 9, 10. No such conflict is presented in this case, as there is no collateral attack by Respondents on a federal judgment. Petitioners' argument is thus factually insupportable.

In an attempt to create a conflict among the circuits justifying this Court's attention to this case, Petitioners cite to two general classes of cases. First, Petitioners cite numerous consent decree and class action settlement cases analyzing jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a). Petition at 12-14. Second, Petitioners cite decisions in which federal judgments are directly attacked, typically under Rule 60(b), for alleged fraud on the court. Petition at 14-15. Neither class of cases is applicable to the straightforward facts of this case.

Petitioners' efforts at conjuring up a conflict among the circuits fails. The conflict alleged by Petitioners requires a collateral attack on a federal judgment. The court of appeals correctly held, consistent with *Kokkonen* and *Rivet*, that there is no collateral attack. Moreover, it is undisputed that Respondents did not plead under Rule 60 and refused to so plead despite an order to do so from the district court in the Fraud Case.

3. *The All Writs Act does not apply.*

The All Writs Act does not apply in this case for two reasons. First, the Act is not at issue in this case. Petitioners belatedly raise the argument for the first time in this Court. They did not argue the Act's application in any of their filings in the district court or the court of appeals, and the Act is not mentioned in, and does not form the basis of, any ruling by the district court or the court of appeals. There is no reason for the Court to consider the Act in this case. *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-98 (1984) (Supreme Court does not ordinarily consider questions not specifically passed on by the lower court; question considered when raised in Petitioners' complaint, acknowledged by district court and court of appeals, and district court made findings on all factual issues necessary to resolve the question).

Second, the All Writs Act is inapplicable because (i) the dismissal order in the Chlordane Case is not a consent decree or an order over which the district court retained jurisdiction and (ii) Respondents' claims in the Fraud Case do not constitute a collateral attack on the dismissal order in the Chlordane Case. The court of appeals found that the district court in the Chlordane Case did not adopt or approve the terms of the settlement. Petition, App. A at 2a. Nor is there any language in the dismissal order to suggest that the district court reserved

jurisdiction to enforce the terms of the settlement. As a result, the many "consent decree" and "class action settlement" cases relied on by Petitioners, in which the district court retained jurisdiction over a federal judgment pursuant to the All Writs Act, are inapplicable.

The All Writs Act is not an independent grant of jurisdiction to a court. Rather, it "merely permits a court to issue writs in aid of jurisdiction acquired to grant some other form of relief." *Telecommunications Research and Action Center v. F.C.C.*, 750 F.2d 70, 77 (D.C. Cir. 1984), *citing Stern v. South Chester Tube Co.*, 390 U.S. 606, 608 (1968) and *Covington & Cincinnati Bridge Co. v. Hager*, 203 U.S. 109, 110 (1906). Unless federal jurisdiction over the case otherwise exists, the All Writs Act does not independently confer jurisdiction. Even if it did, however, Petitioners did not invoke it at any point in the proceedings below and may not now do so.

**B. There is no original or removal federal question jurisdiction in this case.**

The scope of statutory federal question jurisdiction under 28 U.S.C. § 1331 is narrower than the constitutional grant. *See Verlinden B.V. v. Central Bank*, 461 U.S. 480, 493 (1983). Federal question jurisdiction is analyzed under the mandates of the "well-pleaded complaint" rule:

> Whether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute, . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.

*Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10 (1983); *see also Rivet*, 118 S. Ct. at 925. The existence of a federal defense to a state law claim does not confer federal jurisdiction. *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 840-41 (1989). Instead, a suit arises under federal law for purposes of 28 U.S.C. § 1331 only "if there appears on the face of the complaint some substantial, disputed question of federal law." *Carpenter v. Wichita Falls Indep. School Dist.*, 44 F.3d 362, 366 (5th Cir. 1995). Jurisdiction may not be sustained on a theory that the plaintiff has not advanced. *See Merrill Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986).

The same basic tenets apply to federal question removal jurisdiction. A defendant may only remove an action from state court on federal question grounds if the action could have been brought originally in federal court. 28 U.S.C. § 1441. A plaintiff may thus generally defeat removal by choosing to base his action solely upon state law, even if the allegations of the complaint could support a claim under federal law. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). A defendant may not remove an action from state court based upon a federal defense. *Oklahoma Tax Comm'n v. Graham*, 489 U.S. at 840-41. The defendant can only remove a case to federal court if the plaintiff must "establish both the correctness and applicability to his case of a proposition of federal law." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. at 9.

1. *Rivet and Alleged Attacks on Federal Judgments.*

In *Rivet*, this Court clarified that state suits alleging claims inconsistent with federal judgments do not create a federal question. There, this Court held that removal may not be predicated on a defendant's assertion that a prior federal

judgment had disposed of the entire matter and thus barred the plaintiffs from later pursuing a state-law based claim. *Rivet*, 118 S. Ct. at 926. The plaintiff in *Rivet* had filed a state court lawsuit to foreclose on certain real property. The defendants removed the case to federal court, asserting that the plaintiff's suit was preempted by a prior federal judgment. The district court failed to remand the case, instead granting summary judgment to the defendants based on the prior federal judgment. *Id.* at 924. The Fifth Circuit affirmed, holding that removal was proper "where a plaintiff files a state cause of action completely precluded by a prior federal judgment on a question of federal law." *Rivet v. Regions Bank*, 108 F.3d 576, 586 (5th Cir. 1997), *rev'd*, 118 S. Ct. 921 (1998).

This Court reversed. The Court analyzed the citizenship of the parties and the claims the plaintiff had advanced in the state court and determined that no federal jurisdiction existed. *Rivet*, 118 S. Ct. at 925-26. The Court held that the fact that the plaintiff's claim may relate closely to the subject matter of a prior federal judgment does not give rise to federal question removal jurisdiction. *Id.* at 926. The fact that the state court claim may seek relief that a federal court has already considered and ruled upon does not turn the suit into a federal lawsuit. *Id.*

The Court acknowledged the "artful pleading doctrine," pursuant to which removal may be upheld even if no federal question appears on the face of the plaintiff's complaint. *Id.* at 925. That doctrine allows removal where federal law completely preempts a plaintiff's state law claim. *Id.* Federal preemption is ordinarily merely a defense which will not support removal. *Id.* Once an area of state law has been *completely preempted*, however, any claim purportedly based on that preempted state law claim is considered, from inception, a federal claim that arises under federal law. *Id.* The Court held that no complete preemption obtains even when a party seeks to relitigate a matter previously decided by a federal court. *Id.* at 926.

The present case does not raise a federal question. The original state court petition in the Fraud Case raised only state law claims of fraud, conspiracy to defraud, subrogation, wrongful inducement to breach fiduciary duty, and unlawful trade practices. *See* Petition, App. H. The Plaintiffs in the Fraud Case did not plead "*res judicata*," "collateral estoppel" or "Rule 60." No federal question appears on the face of the petition. The Fraud Case, like *Rivet*, was *not* removable.

2. *"Artful Pleading" Does Not Apply: Rule 60, Rule 82, and the Preemption Doctrine.*

This case, like *Rivet*, is *not* a case of artful pleading. Before the "artful pleading" doctrine is invoked, federal law must "completely preempt" an area of state law. *Rivet*, 118 S. Ct. at 925.

The "artful pleading" doctrine applies only where Congress has so completely preempted a particular area of the law that any civil complaint raising the select group of claims is necessarily federal in character. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987). Complete preemption applies only in the extraordinary circumstances when Congress intends, not merely to preempt state law, but to transfer jurisdiction to decide the preemption question from state to federal courts. *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1253 (6th Cir. 1996). This Court has been so reluctant to find complete preemption that it has limited complete preemption to two federal statutes — the Labor Management Relations Act (LMRA) and the Employee Retirement Income Security Act, 29 U.S.C. § 1144(a) (ERISA). *See, e.g., Dobberowsky v. Cryogenic Transportation, Inc.*, 989 F. Supp. 848, 852-53 (E.D. Mich. 1997); *Metropolitan Life Ins. Co.*, 481 U.S. at 65-66; *Avco Corp. v. Machinists*, 390 U.S. 557, 560 (1968). No federal law "completely preempts" any of the claims in the Fraud Case.

Federal Rule of Civil Procedure 60 does not preempt the common law of Texas. Rule 60 is not legislation. It does not reflect *Congress'* intent to preempt a body of state law. Instead it is a rule adopted by this Court setting forth procedures applicable to federal courts. The rule does not purport to govern the conduct of state court litigants. Federal jurisdiction is not derived from Rule 60(b) itself. *See, e.g., In re Hunter*, 66 F.3d 1002, 1005 (9th Cir. 1995). Indeed Rule 82 specifically mandates that Rule 60(b) and all other federal rules "shall not be construed to extend . . . the jurisdiction of the United States district courts." FED. R. CIV. P. 82. For a federal court to have jurisdiction over a suit that might fit with the framework of Rule 60(b), some independent statutory or constitutional basis for jurisdiction must exist. *In re Hunter*, 66 F.3d at 1005. As the court of appeals correctly held, no independent statutory or constitutional basis for federal jurisdiction exists in the Fraud Case.

If the plaintiffs in the Fraud Case had filed a motion pursuant to Rule 60(b)(3), there may have been federal jurisdiction as part of the original case. *In re Hunter*, 66 F.3d at 1005. They did not do so. If the Fraud Case plaintiffs had alleged "fraud on the court," federal supplemental jurisdiction may have been available to the court to "vindicate its authority, and effectuate its decrees." *Kokkonen*, 511 U.S. at 380. They made no such allegation.

Instead, however, the Fraud Case plaintiffs asserted a garden variety state law fraud claim which, at best, may fit within Rule 60's broad catch-all "independent action." As such, however, no independent federal jurisdictional basis exists. *In re Hunter*, 66 F.3d at 1005-06.

Even if Rule 60 were substantive federal law, Rule 60 does *not* completely preempt all state law cases that include fraud counts and that relate to prior federal settlements.

> [N]othing in the language of Rule 60(b) supports the defendants' contention that it precludes an action for fraud in connection with a settlement. Rule 60(b) denotes instances when a court "may relieve a party . . . from a judgment," but it does not purport to cover damages actions for fraud and seek to affirm or ratify a judgment rather than seek relief from a judgment. Its focus is on a specific remedy — obtaining relief from a judgment — not on all available remedies for fraud.

*Cresswell v. Sullivan & Cromwell*, 668 F. Supp. 166, 169 (S.D. N.Y. 1987). *See also In re Hunter*, 66 F.3d 1002 (9th Cir. 1995).

In *Cresswell*, defendants argued that the plaintiffs' common law fraud claim fell within Rule 60(b) and created federal question jurisdiction. Defendants also argued that plaintiffs were required to reopen the judgment and put both parties back in the position they were in prior to settlement. *Cresswell*, 668 F. Supp. at 171. The Court rejected this argument, and held:

> If this were the rule, few plaintiffs would choose to enforce their claim for fraud in connection with a settlement, no matter how valid their cause of action. A plaintiff who must give up any benefit he has gained and risk receiving nothing in return would be reluctant to enforce his rights as a fraud victim. . . . Because the relief sought falls outside the reach of Rule 60, that rule cannot be said to require the plaintiffs to tender back their settlement and sue to reopen the earlier judgment. Plaintiffs may instead affirm the earlier settlement and seek damages for the alleged fraudulent inducement of the settlement.

*Id.* at 172.

**C. There is no supplemental federal jurisdiction in this case.**

In *Kokkonen*, this Court specifically held that the concept of supplemental jurisdiction cannot be stretched far enough to include jurisdiction over suits relating to prior federal settlements. *Kokkonen*, 511 U.S. at 380. The Court held that when parties to a federal court lawsuit settle and jointly move to dismiss a case, the federal court does not retain supplemental jurisdiction over disputes arising out of that settlement agreement unless the district court has expressly reserved the right in its order to enforce the settlement agreement. *Id.* at 381-82. In the present case, the order dismissing the Chlordane Case did not retain jurisdiction over settlement disputes. *See* Petition, App. J.

Whether the dispute is one for breach of contract or fraud, there is no supplemental jurisdiction. Following this Court's decision in *Kokkonen*, a federal district court applied the appropriate analysis and remanded a case removed on the grounds that fraud claims arising out of a settlement in federal court created federal question jurisdiction. *ALFAB, Inc. v. CNA Financial Corp.*, 877 F. Supp. 1538 (M.D. Ala. 1995). In *ALFAB*, parties to a federal lawsuit executed a settlement stipulation resolving the action; the district court adopted the settlement stipulation and dismissed the case with prejudice. Over a year later, the plaintiffs sued the same defendants in the Alabama state court alleging that the defendants acted fraudulently in procuring the settlement agreement reached in the previous action, misrepresented the material information during settlement negotiations and wrongfully canceled certain insurance policies. *Id.* at 1539.

The defendants removed the case and contended that the federal court had supplemental jurisdiction pursuant to Rule 60(b) because the plaintiff's fraud action necessarily questioned the validity of the settlement agreement in federal court. Relying on *Kokkonen*, the court remanded the case.[4] *Id.* at 1540. Similarly, remand was required in the case at bar.

The district court in the instant case attempted to distinguish *Kokkonen* by recharacterizing the claims asserted in the Fraud Case as an attack on a prior federal judgment. It is not such a case, however, and the district court had no authority to violate the well-pleaded complaint doctrine. Respondents do not seek to undo the prior judgment or settlement. This case is a straightforward suit for fraud in settlement negotiations, and *Kokkonen* applies and resolves the issue. Supplemental jurisdiction does not exist.

## III.

## THE COURT OF APPEALS DID NOT EXCEED ITS JURISDICTION IN RULING ON RESPONDENTS' MANDAMUS PETITION.

The court of appeals acted within its jurisdiction when it reversed the district court's decision and vacated the district court's order denying remand. Petitioners argue that, because the court of appeals denied the specific mandamus relief of ordering the remand of the Fraud Case, it was without appellate jurisdiction to reverse and vacate the district court's order denying remand. Petition at 21-22. In making this argument, Petitioners mischaracterize the court of appeals' ruling on Respondents' petition for writ of mandamus.

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4. The *ALFAB* court also rejected the defendants' reliance upon previous cases upholding federal jurisdiction over settlement disputes decided prior to this Court's decision in *Kokkonen*. *Id.* at 1540.

In their petition for writ of mandamus, Respondents asked the court of appeals to (i) issue a writ of mandamus directing the district court to vacate her Order Denying Motion to Remand entered April 21, 1997, and (ii) to enter an order remanding the Fraud Case to state court in Harris County, Texas. Instead of issuing a writ of mandamus directing the district court to vacate its order denying Respondents' motion to remand, the court of appeals vacated that order itself. By doing so, the court of appeals granted Respondents part of the mandamus relief they sought — a reversal and vacation of the district court's order denying remand. Accordingly, this critical mandamus relief sought by Respondents was granted by the court of appeals — *not* denied.

The relief denied by the court of appeals was Respondents' request that the case be remanded to state court. Rejecting that request, the court of appeals instead remanded the case to the district court so it could consider for the first time the issue of diversity jurisdiction. Petition, App. A at 1a.

In sum, the court of appeals granted in part and denied in part Respondents' petition for writ of mandamus. Petitioners' argument that the court of appeals acted without jurisdiction, therefore, rests on the premise that the court of appeals has no jurisdiction to grant part, but not all, of the relief requested in a mandamus petition. This premise is legally incorrect, as federal law does not preclude a court of appeals from partially granting mandamus relief, and courts of appeals, including the Fifth Circuit Court of Appeals, routinely grant such relief. *See In re Terra Int'l, Inc.*, 134 F.3d 302, 303 (5th Cir. 1998) (granting in part and denying in part request for mandamus relief).

Notably, Petitioners do not contend that the court of appeals lacked jurisdiction to consider the merits of Respondents'

mandamus petition. They argue only that, as a result of the denial of mandamus relief, the court of appeals lacked jurisdiction to reverse and vacate the district court's order denying remand to state court. As demonstrated above, the denial of mandamus relief was only partial. The court of appeals *granted* Respondents part of the relief they requested in their petition for writ of mandamus regarding the district court's order denying remand. The court of appeals had the jurisdiction to do so, and Petitioners' argument to the contrary is without merit.

In any event, all federal courts have a continuing obligation to examine the basis for their jurisdiction, and that issue may be raised by the parties or by the court *sua sponte* at any time. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) ("every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.' ") (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). The court of appeals acted within its jurisdiction when it determined, in reversing and vacating the district court's order denying remand, that there is no federal question jurisdiction in the Fraud Case.

## CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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